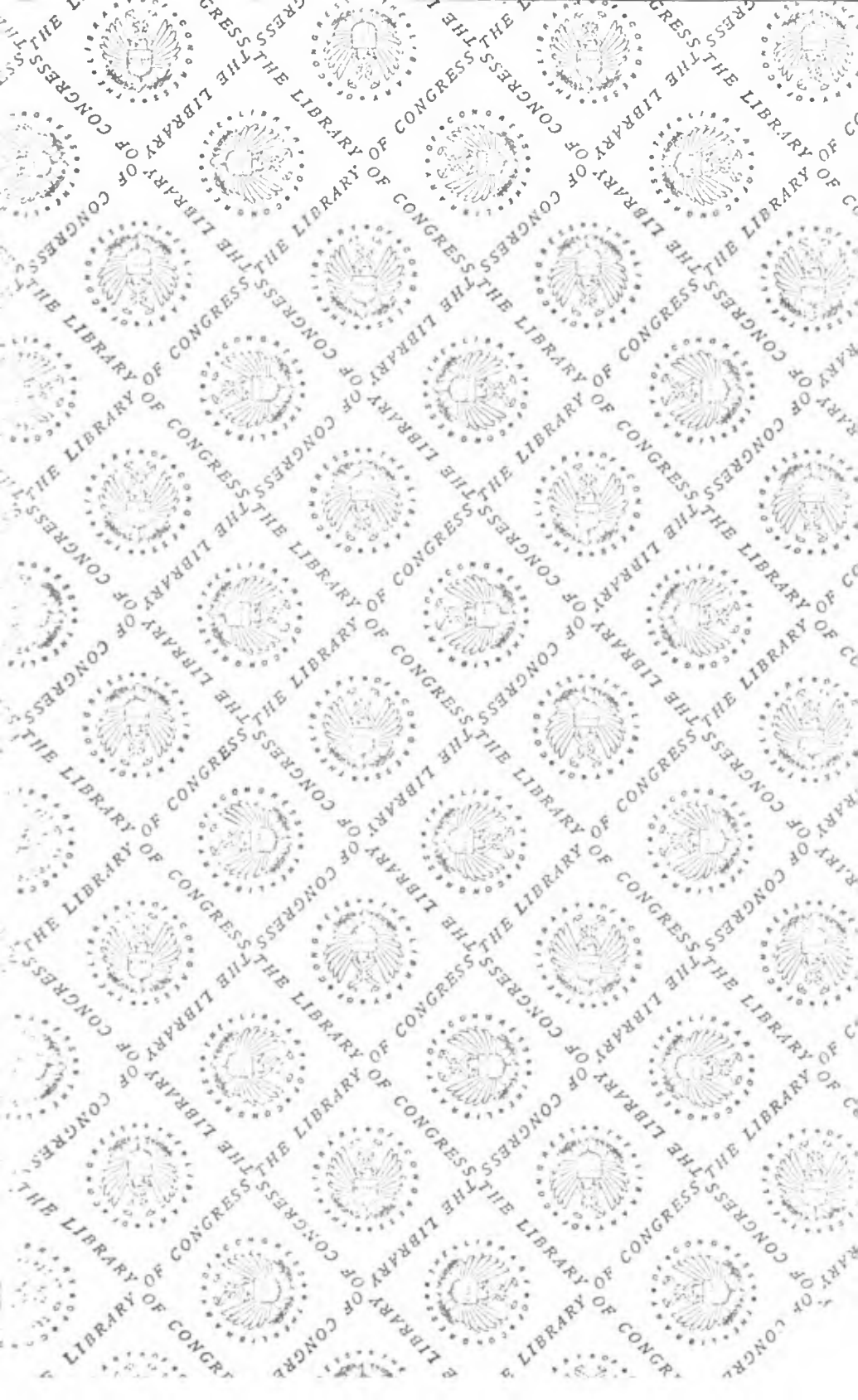


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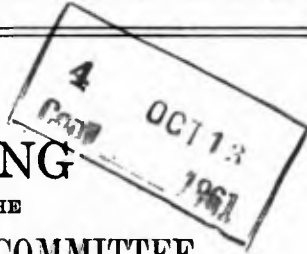






# CIVIL INVESTIGATIVE DEMAND

U.S. Congress, 1961



## HEARING

BEFORE THE

### ANTITRUST SUBCOMMITTEE

(Subcommittee No. 5)

OF THE

### COMMITTEE ON THE JUDICIARY

### HOUSE OF REPRESENTATIVES

EIGHTY-SEVENTH CONGRESS

FIRST SESSION

ON

### H.R. 6689

A BILL TO AUTHORIZE THE ATTORNEY GENERAL TO  
COMPEL THE PRODUCTION OF DOCUMENTARY EVIDENCE  
REQUIRED FOR THE ENFORCEMENT OF THE ANTITRUST  
LAWS

AUGUST 23, 1961

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NEW  
CITY

## CIVIL INVESTIGATIVE DEMAND

WEDNESDAY, AUGUST 23, 1961

HOUSE OF REPRESENTATIVES,  
ANTITRUST SUBCOMMITTEE OF THE  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to call, at 10 a.m., in the caucus room, Old House Office Building, the Honorable Peter W. Rodino, Jr., presiding.

Present. Representatives Rodino (presiding), Rogers, Holtzman, Donohue, Toll, McCulloch, and Meader.

Also present: Herbert N. Maletz, chief counsel; Julian H. Singman, associate chief counsel; William H. Crabtree, associate counsel; and Herbert Fuchs, assistant counsel.

Mr. Rodino (presiding). The Antitrust Subcommittee of the House Judiciary Committee is meeting this morning to receive testimony on H.R. 6689.

We are very happy to welcome the Attorney General this morning, who will testify on this bill which has been introduced by Chairman Celler.

Mr. Attorney General, I would like you to know that Chairman Celler unfortunately is not here now because he is testifying before the Rules Committee on a matter of great interest to your Department, a bill to increase attorneys' salaries in the Justice Department.

Otherwise, he would be here.

Before opening the hearing, Mr. Attorney General, we have a statement submitted by the chairman which will be read by the chief counsel of our committee, Mr. Herbert Maletz. Mr. Maletz?

Mr. MALETZ. This is a statement of Chairman Celler.

The Antitrust Subcommittee is meeting this morning to receive testimony on H.R. 6689, introduced by the Chair, a bill to authorize the Attorney General to compel the production of documentary evidence required in civil investigations for the enforcement of the antitrust laws. A copy of H.R. 6689 will be inserted in the record at the close of this opening statement.

The purpose of the bill is to enable the Attorney General or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice to obtain documentary materials in the possession of business enterprises, where such materials are needed in connection with any antitrust investigation.

Under existing law, when the Department of Justice believes that the antitrust laws are being violated and that a civil case to enjoin further violation of the antitrust laws is more appropriate than a criminal prosecution, and further facts are needed, it may resort to one of four courses, none of which, it is claimed is wholly satisfactory:

- (1) It may seek the cooperation of suspected violators and others in possession of evidence;
- (2) It may initiate a grand jury investigation;
- (3) It may request the Federal Trade Commission to investigate and to make the resulting information available to it; or

(4) It may file a civil complaint without certainty that sufficient evidence exists to support the complaint, and then resort to compulsory process under the Federal Rules of Civil Procedure.

Serious shortcomings have been ascribed to each of these methods. First, it is stated that cooperation is frequently lacking. Second, there is language in the opinion of the Supreme Court in *United States v. Procter and Gamble* (358 U.S. 677 (1958)) which indicates that resort to grand jury proceedings where there is no intention of bringing a criminal prosecution is an abuse of process. Third, it appears that consistent reliance on FTC investigations in aid of the work of the Department of Justice would prove cumbersome to both agencies and would divert Commission funds and staff from normal Commission functions. And fourth, issuance of a complaint without sufficient evidence is undesirable. As has been stated by the Judicial Conference of the United States, no plaintiff, including the Government, may "present to bring charges in order to discover whether actual charges should be brought."<sup>1</sup>

The bill is designed to remedy this situation which the Department of Justice finds reflects an inadequacy in existing civil investigative machinery. It would give the Attorney General or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice authority to issue a written demand requiring any business concern to deliver documentary material for examination whenever he has reason to believe that such concern may be in possession of any such material pertinent to any antitrust investigation. The demand would be required to state the nature of the conduct constituting the alleged violation and the applicable provisions of law, and to describe the class or classes of material to be produced with sufficient certainty as to permit its identification. Further, the demand must prescribe a reasonable return date, the identity of the custodian to whom the evidence is to be delivered, and the place where delivery is to be made.

Under the bill, no such demand may contain any requirement which would be held unreasonable if included in a subpoena duces tecum issued by a court in aid of a grand jury investigation. Nor may it require the production of evidence which would be privileged from disclosure if demanded by such a subpoena duces tecum. The bill provides for the designation of one or more antitrust document custodians who shall take physical possession of material delivered pursuant to a demand.

The bill authorizes the Attorney General to seek court enforcement of demands issued by him and authorizes any person upon whom demand is made to file a petition in court for an order modifying or setting aside the demand. It is also provided that a person who has delivered documents to a custodian in compliance with a demand may petition a court for an order requiring the custodian to perform any duty imposed upon him by the bill. Final orders of courts under these provisions are made subject to appeal, and disobedience of any final order is made punishable as a contempt.

Material in the possession of a custodian may not be examined without the consent of the person who produced it by any individual other than a duly authorized official of the Department of Justice or of an antitrust agency, except that nothing shall prevent the Attorney General from making such material available for examination by the Committee on the Judiciary of either House.

Finally, the bill would amend the obstruction of justice statutes (ch. 73 of title 18 of the United States Code) by providing fine, imprisonment, or both, for willfully removing, concealing, or destroying documentary material which is the subject of an investigative demand, with intent to avoid, evade, prevent, or obstruct compliance.

Proposals for this type of legislation had been under consideration for some time. The Attorney General's National Committee To Study the Antitrust Laws, in its 1955 report, recommended the enactment of such legislation. The previous as well as the present administration have advocated enactment of a measure of this kind. In the 86th Congress, S. 716, a bill similar to H.R. 6689, passed the Senate. In the present Congress, on June 7, 1961, the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary held hearings on Senator Kefauver's bill, S. 167, which is identical with H.R. 6689, and subsequently reported the measure favorably to the full committee.

<sup>1</sup> Judicial Conference of the United States, "Report on Procedures in Antitrust and Other Protracted Cases," 13 F.R.D. 62, 67 (1951).

Mr. Chairman, at this point I would offer for the record a copy of H.R. 6689, a copy of S. 167, as well as the report from the Department of Justice on H.R. 6689.

Mr. RODINO. They will be accepted for the record.  
(The documents referred to follow:)

[H.R. 6689, 87th Cong., 1st sess.]

A BILL To authorize the Attorney General to compel the production of documentary evidence required in civil investigations for the enforcement of the antitrust laws, and for other purposes

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Antitrust Civil Process Act".*

#### DEFINITIONS

##### SEC. 2. As used in this Act—

##### (a) The term "antitrust law" includes:

(1) Each provision of law defined as one of the antitrust laws by section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730, as amended; 15 U.S.C. 12), commonly known as the Clayton Act;

(2) The Federal Trade Commission Act (15 U.S.C. 41 and the following);

(3) Section 3 of the Act entitled "An Act to amend section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U.S.C., title 15, sec. 13), and for other purposes", approved June 19, 1936 (49 Stat. 1528; 15 U.S.C. 13a), commonly known as the Robinson-Patman Act; and

(4) Any statute hereafter enacted by the Congress which prohibits, or makes available to the United States in any court or antitrust agency of the United States any civil remedy with respect to (A) any restraint upon or monopolization of interstate or foreign trade or commerce, or (B) any unfair trade practice in or affecting such commerce;

(b) The term "antitrust agency" means any board, commission, or agency of the United States (other than the Department of Justice) charged by law with the administration or enforcement of any antitrust law or the adjudication of proceedings arising under any such law;

(c) The term "antitrust order" means any final order of any antitrust agency, or any final order, decree, or judgment of any court of the United States, duly entered in any case or proceeding arising under any antitrust law;

(d) The term "antitrust investigation" means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation;

(e) The term "antitrust violation" means any act or omission in violation of any antitrust law or any antitrust order;

(f) The term "antitrust investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any antitrust law;

(g) The term "person" means any corporation, association, partnership, or other legal entity not a natural person;

(h) The term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document; and

(i) The term "custodian" means the antitrust document custodian or any deputy custodian designated under section 4(a) of this Act.

#### CIVIL INVESTIGATION DEMAND

SEC. 3. (a) Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material pertinent to any antitrust investigation, he may issue in writing, and cause to be served upon such a person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and produced;

(4) identify the custodian to whom such evidence is to be delivered; and

(5) specify a place at which such delivery is to be made.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation.

(d) Any such demand may be served by any antitrust investigator, or by any United States marshal or deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(e) Service of any such demand or of any petition filed under section 5 of this Act may be made upon a partnership, corporation, association, or other legal entity by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(2) delivering a duly executed copy thereof to the principal office or place of business of the partnership, corporation, association, or entity to be served; or

(3) depositing such copy in the United States mails, by registered or certified mail duly addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(f) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

#### ANTITRUST DOCUMENT CUSTODIAN

SEC. 4. (a) The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice shall designate an antitrust investigator to serve as antitrust document custodian, and such additional antitrust investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(b) Any person upon whom any demand issued under section 3 has been duly served shall deliver such material to the custodian designated therein at the place specified therein (or at such other place as such custodian thereafter may prescribe in writing) on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). No such demand or custodian may require delivery of any documentary material to be made—

(1) at any place outside the territorial jurisdiction of the United States without the consent of the person upon whom such demand was served; or

(2) at any place other than the place at which such documentary material is situated at the time of service of such demand until the custodian has tendered to such person (A) a sum sufficient to defray the cost of transporting such material to the place prescribed for delivery or (B) the transportation thereof to such place at Government expense.

(c) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this Act. The custodian may cause the preparation of such copies of such documentary material as may be required for official use by any individual who is entitled, under regulations which shall be promulgated by the Attorney General, to have access to such material for exami-

nation. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than a duly authorized officer, member, or employee of the Department of Justice or any antitrust agency, provided nothing herein shall prevent the Attorney General from making available the material so produced for examination by the Committee on the Judiciary of each House of the Congress. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representative of such person.

(d) Whenever any attorney has been designated to appear on behalf of the United States before any court, grand jury, or antitrust agency in any case or proceeding involving any alleged antitrust violation, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court, grand jury, or antitrust agency through the introduction thereof into the record of such case or proceeding.

(e) Upon the completion of (1) the antitrust investigation for which any documentary material was produced under this Act, and (2) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material (other than copies thereof made by the Department of Justice, any antitrust agency or any committee of the Congress, pursuant to subsection (c)) which has not passed into the control of any court, grand jury, or antitrust agency through the introduction thereof into the record of such case or proceeding.

(f) When any documentary material has been produced by any person under this Act for use in any antitrust investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General or upon the Assistant Attorney General in charge of the Antitrust Division, to the return of all documentary material (other than copies thereof made by the Department of Justice or any antitrust agency pursuant to subsection (c)) so produced by such person.

(g) In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material produced under any demand issued under this Act, or the official relief of such custodian from responsibility for the custody and control of such material, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian thereof, and (2) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this Act upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

#### JUDICIAL PROCEEDINGS

Sec. 5. (a) Wherever any person fails to comply with any civil investigative demand duly served upon him under section 3, the Attorney General, through such officers or attorneys as he may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of such demand, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(b) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which the office of the custodian designated therein is situated, and served upon such custodian a petition for an order of such court modifying or setting aside such demand. Such petition shall specify each

ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this Act, or upon any constitutional right or privilege of such person.

(c) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this Act.

(d) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this Act. Any final order so entered shall be subject to appeal pursuant to section 1291 of title 28 of the United States Code. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

#### CRIMINAL PENALTY

Sec. 6. (a) Chapter 73 of title 18 of the United States Code (relating to obstruction of justice) is amended by adding at the end thereof the following new section:

##### **§ 1509. Obstruction of antitrust civil process**

"Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part, by any person with any civil investigative demand made under the Antitrust Civil Process Act, willfully removes from any place, conceals, withholds, destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody or control of any person which is the subject of any such demand duly served upon any person shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

(b) The analysis to such chapter is amended by inserting at the end thereof the following new item:

"1509. Obstruction of antitrust civil process."

#### SAVING PROVISION

Sec. 7. Nothing contained in this Act shall impair the authority of the Attorney General, the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, or any antitrust investigator to (a) lay before any grand jury impaneled before any district court of the United States any evidence concerning any alleged antitrust violation, (b) invoke the power of any such court to compel the production of any evidence before any such grand jury, or (c) institute any proceeding for the enforcement of any order or process issued in execution of such power, or to punish disobedience of any such order or process by any person.

[S. 167, 87th Cong., 1st sess.]

A BILL To authorize the Attorney General to compel the production of documentary evidence required in civil investigations for the enforcement of the antitrust laws, and for other purposes

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Antitrust Civil Process Act".*

#### DEFINITIONS

SEC. 2. As used in this Act—

(a) The term "antitrust law" includes:

(1) Each provision of law defined as one of the antitrust laws by section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730, as amended; 15 U.S.C. 12), commonly known as the Clayton Act;

(2) The Federal Trade Commission Act (15 U.S.C. 41 and the following);

(3) Section 3 of the Act entitled "An Act to amend section 2 of the Act entitled 'An Act to supplement existing laws against unlawful re-



strata and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C. title 15, sec. 13), and for other purposes", approved June 19, 1936 (49 Stat. 1528; 15 U.S.C. 13a), commonly known as the Robinson-Patman Act; and

(4) Any statute hereafter enacted by the Congress which prohibits, or makes available to the United States in any court or antitrust agency of the United States any civil remedy with respect to (A) any restraint upon or monopolization of interstate or foreign trade or commerce, or (B) any unfair trade practice in or affecting such commerce;

(b) The term "antitrust agency" means any board, commission, or agency of the United States (other than the Department of Justice) charged by law with the administration or enforcement of any antitrust law or the adjudication of proceedings arising under any such law;

(c) The term "antitrust order" means any final order of any antitrust agency, or any final order, decree, or judgment of any court of the United States, duly entered in any case or proceeding arising under any antitrust law;

(d) The term "antitrust investigation" means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation;

(e) The term "antitrust violation" means any act or omission in violation of any antitrust law or any antitrust order;

(f) The term "antitrust investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any antitrust law;

(g) The term "person" means any corporation, association, partnership, or other legal entity not a natural person;

(h) The term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document; and

(i) The term "custodian" means the antitrust document custodian or any deputy custodian designated under section 4(a) of this Act.

#### CIVIL INVESTIGATIVE DEMAND

SEC. 3. (a) Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material pertinent to any antitrust investigation, he may issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and produced;

(4) identify the custodian to whom such evidence is to be delivered; and

(5) specify a place at which such delivery is to be made.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation.

(d) Any such demand may be served by any antitrust investigator, or by any United States marshal or deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(e) Service of any such demand or of any petition filed under section 5 of this Act may be made upon a partnership, corporation, association, or other legal entity by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(2) delivering a duly executed copy thereof to the principal office or place of business of the partnership, corporation, association, or entity to be served; or

(3) depositing such copy in the United States mails, by registered or certified mail duly addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(f) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

#### ANTITRUST DOCUMENT CUSTODIAN

Sec. 4. (a) The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice shall designate an antitrust investigator to serve as antitrust document custodian, and such additional antitrust investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(b) Any person upon whom any demand issued under section 3 has been duly served shall deliver such material to the custodian designated therein at the place specified therein (or at such other place as such custodian thereafter may prescribe in writing) on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). No such demand or custodian may require delivery of any documentary material to be made—

(1) at any place outside the territorial jurisdiction of the United States without the consent of the person upon whom such demand was served; or

(2) at any place other than the place at which such documentary material is situated at the time of service of such demand until the custodian has tendered to such person (A) a sum sufficient to defray the cost of transporting such material to the place prescribed for delivery or (B) the transportation thereof to such place at Government expense.

(c) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this Act. The custodian may cause the preparation of such copies of such documentary material as may be required for official use by any individual who is entitled, under regulations which shall be promulgated by the Attorney General, to have access to such material for examination. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than a duly authorized officer, member, or employee of the Department of Justice or any antitrust agency, provided nothing herein shall prevent the Attorney General from making available the material so produced for examination by the Committee on the Judiciary of each House of the Congress. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representative of such person.

(d) Whenever any attorney has been designated to appear on behalf of the United States before any court, grand jury, or antitrust agency in any case or proceeding involving any alleged antitrust violation, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court, grand jury, or antitrust agency through the introduction thereof into the record of such case or proceeding.

(e) Upon the completion of (1) the antitrust investigation for which any documentary material was produced under this Act, and (2) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material (other than copies thereof made by the Department of Justice, any antitrust agency or any committee of the

Congress, pursuant to subsection (c)) which has not passed into the control of any court, grand jury, or antitrust agency through the introduction thereof into the record of such case or proceeding.

(f) When any documentary material has been produced by any person under this Act for use in any antitrust investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General or upon the Assistant Attorney General in charge of the Antitrust Division, to the return of all documentary material (other than copies thereof made by the Department of Justice or any antitrust agency pursuant to subsection (c)) so produced by such person.

(g) In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material produced under any demand issued under this Act, or the official relief of such custodian from responsibility for the custody and control of such material, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian thereof, and (2) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this Act upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

#### JUDICIAL PROCEEDINGS

SEC. 5. (a) Whenever any person fails to comply with any civil investigative demand duly served upon him under section 3, the Attorney General, through such officers or attorneys as he may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of such demand, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(b) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which the office of the custodian designated therein is situated, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this Act, or upon any constitutional right or privilege of such person.

(c) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this Act.

(d) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this Act. Any final order so entered shall be subject to appeal pursuant to section 1291 of title 28 of the United States Code. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

#### CRIMINAL PENALTY

SEC. 6. (a) Chapter 73 of title 18 of the United States Code (relating to obstruction of justice) is amended by adding at the end thereof the following new section:

##### "§ 1509. Obstruction of antitrust civil process

"Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part, by any person with any civil investigative demand made under

the Antitrust Civil Process Act, willfully removes from any place, conceals, withholds, destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody or control of any person which is the subject of any such demand duly served upon any person shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

(b) The analysis to such chapter is amended by inserting at the end thereof the following new item:

"1509. Obstruction of antitrust civil process."

#### SAVING PROVISION

Sec. 7. Nothing contained in this Act shall impair the authority of the Attorney General, the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, or any antitrust investigator to (a) lay before any grand jury impaneled before any district court of the United States any evidence concerning any alleged antitrust violation, (b) invoke the power of any such court to compel the production of any evidence before any such grand jury, or (c) institute any proceeding for the enforcement of any order or process issued in execution of such power, or to punish disobedience of any such order or process by any person.

GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE,  
Washington, D.C., June 28, 1961.

HON. EMANUEL CELLER,  
*Chairman, Committee on the Judiciary,*  
*House of Representatives,*  
Washington, D.C.

DEAR MR. CHAIRMAN: This report sets forth the views of the Department of Commerce with respect to H.R. 6689, a bill to authorize the Attorney General to compel the production of documentary evidence required in civil investigations for the enforcement of the antitrust laws, and for other purposes.

This bill is substantially the same as S. 716, which was passed by the Senate during the 86th Congress but was not acted on by the House.

It is our understanding that the Department of Justice has in the past made a strong case for the need for the authority which would be provided by H.R. 6689. On the general need for legislation in this area we would defer to that Department with its enforcement responsibilities, but on one aspect of the scope of the authority provided by such legislation we want to make our position very clear.

The Department of Commerce collects from businessmen a multitude of statistics which are submitted to the Department on a confidential basis and which the Department is forbidden, under penalty of law, from divulging (see, for example, 13 U.S.C. 9, and 50 U.S.C. app. 2155(e)).

Section 9 of title 13 of the United States Code relating to census makes clear that information furnished under provisions of title 13 shall be kept confidential with certain exceptions immaterial to present considerations. Title 13 provides authority for the Department of Commerce to obtain information on both a voluntary and mandatory basis and no distinction with respect to the basis is made insofar as the confidentiality of the information received is concerned.

In the Department of Commerce, we have consistently taken the position that this confidentiality applies not only to original reports or forms filed with the Department but also to copies of such reports and forms retained by the person or corporation making the report or filing the form. The inviolability of the copies is considered essential to the inviolability of the originals. Such copies are retained at the request of the Department for reference and communication purposes in subsequent discussions with the Department.

Recent litigation has raised a question as to whether or not the retained copies should be entitled to the confidentiality provided for the original reports. In April 1960, the United States Court of Appeals for the Seventh Circuit ruled that the Federal Trade Commission could not compel by subpoena the production of a copy of a census schedule (276 F.(2) 739). Certiorari was denied (364 U.S. 882). In December 1960, the United States Court of Appeals for the Second Circuit ruled that copies retained in the taxpayer's files are subject to subpoena (285 F. 2d 607). Certiorari has been granted in the latter case (365 U.S. 857).

While it is our view that, once it becomes established that copies would be available to regulatory agencies, our program of procuring census data would be seriously jeopardized, it is not our intention to seek an amendment to H.R. 6689 to resolve this matter. Rather we urge an amendment which would make clear that the resolution of the matter by the Supreme Court in its consideration of the *St. Regis* case would prevail with respect to copies after enactment of H.R. 6689.

We urge amendment of section 3(c), page 5, by striking the word "or" in line 10, changing the period in line 15 to "; or", and adding a new subsection between lines 15 and 16 to read as follows:

"(3) require the production of any copy of a document the original of which was obtained by a Government agency on the basis of confidentiality and which copy would otherwise be privileged from disclosure if demanded by a subpoena duces tecum issued by any antitrust agency."

Under such an amendment it would be clear that, if the Court determines that copies are not available in the absence of the language of H.R. 6689, they would continue not to be available after enactment of the bill as so amended. Conversely, if the determination were to result in copies being available, the Attorney General could demand and receive such copies after enactment of H.R. 6689.

The Bureau of the Budget advises that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

ROBERT E. GILES.

Mr. RODINO. Mr. McCulloch has a statement which he would like to read.

Mr. McCULLOCH. I have a brief statement, Mr. Chairman.

Mr. Chairman, I, too, wish to welcome the Attorney General, who is appearing before us this morning, as well as the other distinguished witnesses, Mr. Henderson, the General Counsel of the Federal Trade Commission, and Mr. Simon, the spokesman for the American Bar Association.

As a matter of fact, we always welcome the advice and counsel of these gentlemen on legislative proposals which come before this subcommittee, particularly on the matters which pertain to, and are designed to strengthen, the antitrust laws of the country.

We, of course, have some knowledge of the problems which have occasioned the request for the legislation to grant subpoena power to the Department of Justice and to the Federal Trade Commission to be used in the investigation and the preparation of civil, as opposed to criminal, proceedings.

This proposal, if my memory serves me correctly, was one of the recommendations contained in the Report of the Attorney General's National Committee To Study the Antitrust Laws of some 5 or 6 years ago. This committee, which rendered a very thorough and valuable report covering the entire field of antitrust enforcement, was created or formed under the leadership of former Attorney General Brownell. In my opinion, the report is really a landmark in the field.

Speaking for myself only, I am of the opinion that the proposed legislation should be the subject of very thorough hearings. The proposal to give civil investigative subpoena power to a prosecuting agency is certainly a departure from the present procedure, which although subject to some inconvenience, has generally been satisfactory.

I am also interested in the suggestions made at the time of the Senate hearings to improve the bill that we have before us, and I hope that the witnesses will take time this morning to go into this phase of the matter and give us the benefit of their knowledge and experience in this field.

Mr. RODINO. Thank you very much, Mr. McCulloch.

Mr. Attorney General, you may now proceed.

**STATEMENT OF ROBERT F. KENNEDY, ATTORNEY GENERAL OF  
THE UNITED STATES**

Mr. KENNEDY. Mr. Chairman, Congressman McCulloch, I appear here today in response to the request of your chairman, Congressman Celler, to discuss H.R. 6689, a bill now pending before your committee. I am grateful for the opportunity to present the Justice Department's views on this bill. We believe that the discovery device which it would create is urgently needed.

The U.S. Supreme Court has called the Sherman Act a charter of freedom. Certainly, it is just that. The principles of free enterprise which the antitrust laws are designed to protect and vindicate are economic ideals that underlie the whole structure of a free society. Since the passage of the Sherman Act in 1890, the Congress has continually responded to the need to effectuate these principles. The Clayton Act of 1914, the Robinson-Patman Act of 1936, the Celler-Kefauver Act of 1950, and other acts, have increased the protection the law affords our system of competitive free enterprise. The Department of Justice realizes that it has no more important function than enforcing these laws. However, we find ourselves hampered in our enforcement program because we lack certain vital tools of investigation.

There cannot be an effective antitrust program unless the means of investigation are thorough and effective. In recent years, antitrust has faced increasingly serious difficulties in this regard. Antitrust violators have become more sophisticated. In the recently discovered price-fixing conspiracy in the electrical industry, for example, the conspirators used elaborate codes to communicate with each other, and destroyed whatever notes and memorandums were not essential to their operations. With its tracks carefully covered, this conspiracy was able to go on for years.

At one time, American corporations generally allowed antitrust investigators free access to their files. That policy of compliance with the Department of Justice has undergone a marked change in recent years. We are submitting to the committee today summaries of recent antitrust investigations which describe the sort of situation which occurs more and more frequently. The Department's request for information or for access to company files are met with stalling and hedging tactics and often with flat refusals. As these summaries will indicate, some companies have now adopted a policy of submitting information or documents only under subpoena.

Mr. Chairman, I have these cases here. Would you like me to submit them to you now?

Mr. RODINO. Yes; we will be happy to have them.

Mr. KENNEDY. I think you will find them of some interest and maybe we could talk about some of them.

Mr. RODINO. Thank you very much.

Mr. KENNEDY. In any investigation into criminal violations of the Sherman Act, the Department can utilize the grand jury and its subpoena duces tecum to compel the production of pertinent material. In such a case our investigation can proceed effectively; in many other cases, it cannot. The Clayton Act, as amended by the Celler-Kefauver Act, is not a criminal statute and the grand jury is not available to us in investigations under this act. In addition, there is

an important category of Sherman Act cases in which we cannot use the grand jury.

This was declared by the Supreme Court's decision in *United States v. Procter and Gamble* (356 U.S. 677 (1958)). The Court there held that it was an abuse of process to use the grand jury where there was no intention to bring a criminal case. Thus, when we do not contemplate criminal sanctions for antitrust violators, we must depend upon voluntary compliance with requests for documents.

The class of cases affected by the *Procter and Gamble* decision is every bit as important as the criminal antitrust case. Many Sherman Act violations are best remedied by civil suit alone. A companion criminal case often delays the course of a civil suit. Thus, where it is essential that the civil remedies of injunction or divestiture be obtained quickly, a criminal case may be inadvisable. In other situations, the evidence uncovered may not be strong enough to meet the strict burden of proof in criminal cases. The conduct uncovered may not indicate such willful disregard for the public interest that the stigma of a criminal conviction is warranted. In all of these cases, important as they are, we are now unable to use the grand jury.

The *Procter and Gamble* decision threatens to have another serious effect on our enforcement program. We face serious harassment where we recommend to a grand jury that an indictment not be returned and then file a civil suit relating to the same subject matter. This happened recently in *United States v. Carter Products, Inc.*, a civil case filed in the southern district of New York in January 1960. Defendants alleged that the decision not to ask for an indictment was made before the termination of the grand jury proceeding. They charged an abuse of process and filed interrogatories, noticed depositions, and subpoenaed 13 attorneys and officials in the Justice Department, involving a former Attorney General.

A substantial amount of time has already been spent on these proceedings and related motions. Considerably more time will be spent before this phase of the litigation is disposed of. None of this is at all concerned with the merits of the case, and it will contribute nothing to a determination of the merits. As long as the grand jury is the only means available to compel the production of evidence, such harassment and delay will continue to occur in civil antitrust litigation.

But this is just one unpleasant side effect of our dilemma. The effect on our antitrust investigations is even more serious because we have no sure way to obtain evidence. Investigations under the Clayton and Celler-Kefauver Acts are particularly affected since these cases require extensive proof of economic facts to define lines of commerce and show production and sales activity. Very often the only reliable information on these matters is in the files of companies in the industry being investigated. If these companies do not cooperate with us, and often they do not, it is very hard to gather enough evidence to determine whether suit is warranted, or to bring suit where we think it is required. We encounter the same difficulty in many Sherman Act investigations. I am sorry to say that we have had to put investigations aside or drop them completely because we simply could not get reliable sources of information. The seriousness of such a situation is obvious.



The bill now before you, H.R. 6689, is designed to eliminate the serious weakness which now exists in the Department's investigative procedures. It does just this and with fairness both to the parties investigated and the Government. The bill would empower the Attorney General and the Assistant Attorney General in charge of the Antitrust Division to issue civil investigative demands for documentary material pertinent to antitrust investigations. Such demands could be directed only to corporations and not to individuals. These demands would have to state the conduct under investigation and the provisions of law applicable. They would have to describe the documents to be produced with such definiteness that they could be fairly identified. These civil investigative demands would be subject to the same limitations of reasonableness and privilege as those imposed on grand jury subpoenas duces tecum. These safeguards insure that this new investigative tool could not be used to harass. The bill's purpose is simply to make available to the Justice Department in civil antitrust cases the same discovery powers it now has in criminal investigations.

This civil investigative demand bill is procedural in nature. I am sure that this will not lead you to underestimate its importance. The pressure to compromise the principle of our antitrust laws has never been greater than it is today. The tendency of some big business to merge and to concentrate is increasing. There is also disturbing evidence that a significant segment of our business community has not adhered to the principle of competitive enterprise on which these laws are founded. Recent antitrust cases, and investigations by this committee and its counterpart in the Senate, have helped to educate the public concerning the antitrust laws—that they exist and that they mean what they say. But the effect of the laws, moral and economic, will suffer if they are not quickly and effectively enforced.

The need for a civil investigative demand has been widely recognized. In 1955 the Attorney General's Committee To Study the Antitrust Laws recommended the enactment of similar legislation. It was also recommended by the previous administration. The American Bar Association has endorsed the principle of this legislation.

In conclusion, I respectfully urge the committee to use its every effort on behalf of this bill. Its enactment would have a great effect in preserving the vitality and effectiveness of the antitrust laws.

Thank you, Mr. Chairman.

(The Attorney General's prepared statement is as follows:)

STATEMENT OF ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

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In conclusion, I respectfully urge the committee to use its every effort on behalf of this bill. Its enactment would have a great effect in preserving the vitality and effectiveness of the antitrust laws.

Mr. RODINO. Thank you.

Mr. Attorney General, what would you say has been the experience of the Department in prosecuting matters in this area insofar as relying on voluntary compliance of the defendants to produce documents?

Mr. KENNEDY. It is getting extremely difficult, Mr. Chairman. I found that within the first month that I was in the Department of Justice. In talking with attorneys who have been there for a long time, they said that the atmosphere and the feeling on the part of business has changed drastically in the last 4, 5, or 6 years. Where companies would afford cooperation and make documents available, that attitude no longer exists. We are having an extremely difficult time getting cooperation from many businesses and companies throughout the United States. So it is really that attitude where they refuse to cooperate with the Government, in our attempt to enforce the law—where they refuse to comply voluntarily with our requests when we make investigations, that has led to this result.

We need these tools now because we are not getting the voluntary cooperation that we need.

Mr. RODINO. Then your experience substantiates the Attorney General's committee report submitted in 1955 demonstrating the need for this legislation, and also supports the recommendations of the previous administration?

Mr. KENNEDY. And I think that just tracing the situation, Mr. Chairman, it has become much more acute in the last 18 months than it was when they made the suggestion back in 1955. It is far more difficult now. I would say that is really one of our most important and critical problems within the Department of Justice at the present time in the antitrust field.

We just cannot get voluntary cooperation now from companies and corporations.

Mr. RODINO. Therefore, you conclude that it would be impossible to successfully operate in this area without this legislation.

Mr. KENNEDY. Absolutely. That is why we appear today, Mr. Chairman.

Mr. RODINO. Thank you.

Mr. Counsel?

Mr. MALETZ. Mr. Chairman.

Mr. Attorney General, as I understand it the attorneys general of some 12 States have powers to enforce State antitrust laws similar to those proposed by the pending legislation, is that correct?

Mr. KENNEDY. That is correct.

Mr. MALETZ. And I also understand that the States of Washington and Hawaii have recently enacted legislation similar to H.R. 6689?

Mr. KENNEDY. Yes. Hawaii, I think, just did it in May of this year.

Mr. MALETZ. Yes.

Mr. KENNEDY. We had a representative of the Department of Justice who consulted with officials of the government of Hawaii.

Mr. MALETZ. Now, this appendix to your testimony captioned "Case Studies of Celler-Kefauver Sherman Act Investigation Problems" indicates that in a number of instances involving possible violations of the Sherman Act, companies have declined to cooperate with a Department of Justice investigation in furnishing needed information, is that right?

Mr. KENNEDY. That is correct.

Mr. MALETZ. I would, Mr. Chairman, offer these case studies for the record at this point.

Mr. RODINO. It will be admitted.

(The documents referred to are as follows:)

#### CASE STUDIES OF CELLER-KEFAUVER AND SHERMAN ACT INVESTIGATION PROBLEMS

This folder contains a list of case studies where denial of voluntary access to data thwarted investigations under the Celler-Kefauver or Sherman Acts.

In presenting these specific illustrations, care has been exercised to avoid disclosure of the identity of individuals, corporations, and industries. They are, however, based on actual fact situations which are on file in the Department of Justice.

#### CASE STUDY NO. 1

In May 195— an announcement was made that a prominent manufacturer of certain household items, with sales the previous year of over \$200 million, purchased the competitive manufacturing division of another corporation.

On June 26 we wrote the acquiring corporation our customary merger letter seeking information to assist us in evaluating the merger. On July 3 we were advised by house counsel that our letter had been turned over to a well-known law firm. On July 13 we received a letter from a member of that firm, saying in part:

"It is necessary for me to be out of town for about 10 days or 2 weeks on business. As soon as I return I will look into the matter and write you again."

On August 13 we received another letter from this individual stating:

"We prefer not to supply the data requested by [your] letter except under subpoena. However, we are willing to give you the following information: Copies of the 1953, 1954, and 1955 reports of [the corporation] are enclosed as requested."

This letter then states the amount of money paid for the property, equipment, and inventory and gives some additional information designed to convince us that the transaction was a liquidation of assets in an attempt to stop losses rather than a sale of a going business.

#### CASE STUDY NO. 2

In October 195- the Antitrust Division sent the general counsel of a very large corporation an inquiry letter relating to the corporation's recent acquisition of two significant retail chains. The letter was acknowledged by counsel November 6, stating he would supply us with the information requested as soon as it could be compiled. Much of the information requested was supplied by a letter dated December 7.

By letter dated the following January 23, the Antitrust Division requested additional material and information, among which was a request that it be furnished with a copy of a study by one of the corporation's divisions concerning the feasibility of establishing a processing plant in the vicinity of the retail outlets.

On February 27 the Antitrust Division sent counsel a followup letter because it had had no response to its January 23 letter. A response to both letters was received on March 20. The letter stated:

"\* \* \* our production of documents of the sort now called for should be limited to those submitted to the executive committee of the board of directors after these acquisitions had been proposed and were before them for consideration \* \* \*. Accordingly, we hope you will agree that we should not be asked to supply other material and data of a hypothetical and speculative nature or which in whole or in part found its way into the studies referred to."

Thus, the Antitrust Division was denied access to a document, the importance of which to its investigation is revealed in this extract from an internal memorandum.

"In approving the acquisition of [one of the retail outlets] the executive committee referred to the study of the \* \* \* Division and made the following statement:

"It was also mentioned that in the event plans materialized for the construction, by 1961, of a [processing plant] at [vicinity of the retail outlets] to supply the product requirements of company interests in the [vicinity of the retail outlets], it is anticipated that when allocating a proportionate share of the [processing plant] investment against the [retail outlets'] business a combined marketing and refining net annual profit of 11.6 percent would be realized on the average net book value of the company in that year."

On August 24 the executive committee approved the acquisition of the other retail outlets. Minutes of this meeting discussed the expansion program set forth in the study of the \* \* \* Division and go on to state as follows:

"Assuming such a program is carried out and that company interests construct a [processing plant] in the [vicinity of the retail outlets] by 1961, and when allocating \$6 million of the [processing plant] investment against the [retail outlets'] business, it is anticipated that a combined marketing and [processing] net profit of 10.22 percent would be realized in 1961 on the total 'investment' base of \$11.7 million.

"All minutes of the executive committee also contain a provision that expansion and [processing plant] proposals will be submitted and considered on their own merits from time to time in the future.

"It is apparent from the foregoing that the eventual establishment of a [processing plant] in the [vicinity of the retail outlets] to supply the volume of business which [the corporation] has acquired in the [retail outlets'] purchases is an integral part of [the corporation's] present plans. There is clearly a good possibility that such plans will culminate with the establishment of such a [processing plant] in [the vicinity of the retail outlets]. If this occurs, the present supplier of the acquired corporations will be irrevocably foreclosed from the share of the market represented by [the retail outlets].

## CASE STUDY NO. 3

In May 195- contracts transferring certain assets from one corporation to another were executed. [The acquiring corporation was among the 100 largest and the industry of which it is a member is highly concentrated.] The following day May 23, counsel for the acquiring corporation verbally advised a member of the Antitrust Division of the acquisition.

On July 31 we sent a merger inquiry letter to counsel requesting 24 items of information. On August 2 counsel called to advise the Department's letter had been received in the middle of the vacation plans and he doubted if information would be furnished prior to the week of September 9. On September 18 a conference was held between corporation counsel and representatives of the Division, at which certain requested documents were presented and answers furnished orally to a number of our questions. Corporation's counsel stated the purpose of the conference, which was held at their request, was to insure that the answers were satisfactory and written answers would follow the conference. During the conference certain statistical data was presented in the form of scraps of paper torn from a document in the possession of corporation's counsel.

On October 29 we received a memorandum from corporation's counsel embodying answers to eight questions. On November 18 we sent corporation counsel a document continuing our understanding of the oral answers presented to the eight questions at the September 18 conference, as well as a listing of the material presented by scraps of paper at the conference in answer to five other questions. The purpose of this letter was to hasten what appeared to be a dragging process. On November 27 corporation's counsel confirmed with certain amendments the answers contained in our November 18 letter.

Thus, 5 months after our initial letter, we finally obtained a semblance of a response to it.

## CASE STUDY NO. 4

On April 2, 195-, we wrote to a large corporation requesting information relating to a certain acquisition it had made. Partial responses were made on May 6 and 15, and June 9. On August 8 we responded to a number of questions raised by the corporation with respect to our request, and also asked for additional information.

At the request of counsel a conference was held on September 17 to discuss the corporation's compliance with our request. At the conference counsel requested to be relieved of complying with our request for certain data. On October 8 the corporation summarized its ability and inability to furnish certain of the information previously requested. On October 23 we inquired whether the corporation intended to comply with certain of the requests for information made on April 3 and August 8. At various times prior to and on December 31, the corporation supplied certain of the data previously requested.

However, by the same letter it declined to furnish certain types of information deemed by us to be of most importance in determining whether suit against the corporation was warranted. In addition, some of the few documents supplied were incomplete and others had important parts blanked out in the reproduction thereof.

Thus, after 8 months we concluded we would have to obtain the information, if available, from other sources.

## CASE STUDY NO. 5

On July 28, 195-, the Antitrust Division wrote to a certain corporation seeking information concerning certain acquisitions it had made. On September 4 the corporation supplied part of the information. On November 10 we requested the balance of the information sought. The following January 14 the general counsel of the corporation sent additional information and promised to send the balance within a few weeks. On April 3 we again wrote the corporation requesting the balance of the material sought on July 28 and last promised on January 14, together with material relative to acquisitions made by the corporation after July 28. On September 21 the corporation furnished part of the data requested on April 3 and prior thereto.

On October 8 we wrote the corporation seeking information on new acquisitions. On October 17, 27, and 30, and November 11, the corporation supplied parts of the data previously requested. On November 25 we again requested data on a number of recent acquisitions by the corporation. On December 2

the corporation supplied a small amount of data and advised it needed time to comply with our last request.

For a year and a half we corresponded with the corporation but did not receive sufficient information to determine whether the corporation has violated section 7. The corporation had even made further acquisitions before it supplied some information on past acquisitions.

#### CASE STUDY NO. 6

On December 6, 195-, we sent our usual merger inquiry letter to a large corporation concerning its acquisition of the assets of a competitor. On December 10 we received a letter from a member of the law firm to which our inquiry had been referred, stating that as he would be out of town for the next few weeks, it would be a short while before a reply could be made to our request. On December 16, 195-, we advised him of our concern over press reports that the acquisition might be consummated before the end of the month and urged that the information requested be supplied as quickly as possible. A second letter expressing our concern was sent to him on December 20. In response the attorney in a letter dated December 26, stated he would respond to our queries when he " \* \* \* receive(s) specific information concerning the purchase and its effect, if any, on competition". Subsequent information indicated the merger was consummated December 31.

On the following February 4 the attorney responded to our letters of December 6, 16, and 20, but the information and material contained in his letter was not an adequate response to our inquiries. On March 4 we advised him of that fact; on March 24 he responded by stating that the reason he had not answered all questions was that we were under the misapprehension that the two corporations were contemplating a merger when in fact one acquired the assets of the other. The letter did contain some additional information.

On April 17 we addressed a letter to the attorney requesting more detailed information. On April 29 he responded that he was giving consideration to our request. On May 9, when he was in Washington on other matters, he stopped in and asked for a conference. He stated the purpose of his visit was to determine what was troubling the Government attorneys. He then took the April 17 letter and said, if he could be convinced of its relevance to a section 7 inquiry, he would consider furnishing the additional information. Most of the conference time was consumed by the attorney giving representatives of the Division a lecture on section 7, and insisting that most of the information requested had no relevancy.

On June 5 he responded to our April 17 letter; on July 2 we asked for clarification of one of his answers; on July 14 he responded by asking the Division to state how a clarification would be relevant to our inquiry; on July 23 we sent a letter to him showing the relevancy of our request; on August 5 he responded to our July 2 letter.

At this point, after more than 9 months of effort and still not having an adequate response to our inquiries, we turned to other sources. On the basis of production data voluntarily supplied, which we requested of the acquiring corporation's competitors and industry information obtained from the trade association, we finally were able to evaluate this acquisition.

#### CASE STUDY NO. 7

Because the particular acquisition involved in this case study has become the subject matter of a section 7 complaint and a discussion of details in this study as in other case studies would disclose the identity of the companies involved, little can be said except that the failure on the part of the acquiring corporation to supply timely information has placed the Government in the situation where it has had to rely almost exclusively on the Federal Rules of Civil Procedure to obtain evidence.

#### CASE STUDY NO. 8

On December 8, 195-, a large corporation acquired two corporations engaged in a business which was noncompetitive to that of the acquiring corporation but was related. The same commodity is an important component of the manufactured products of all three companies.

On December 11 we requested information on the transaction from the parties, suggesting that if some of the information were readily available, it could be submitted and the remainder supplied as it was prepared.

On December 15 the president of the corporation wrote stating the requested information would be assembled and furnished as soon as possible. By the middle of the following month, however, when the press reported the purchase by the acquiring corporation of a third corporation engaged in the same business as the first two, the Division still had received no information in response to the December 11 request.

## CASE STUDY NO. 9

A significant retail chain acquired another retail chain in the late summer of 195-. Both chains operated in many of the same cities and in the same section of the country. On November 10 one of our field offices wrote to the acquiring corporation seeking pertinent information. On November 21 counsel for the acquiring corporation visited the field office and submitted very limited information and promised to furnish additional information.

On December 2 the field office wrote seeking additional data and reminding counsel he had promised to cooperate in supplying needed information. Counsel furnished profit-and-loss statements for a 3-year period but this was insufficient to determine whether the acquired corporation was a "failing company."

On December 12 the field office again wrote counsel for information requested on December 2. Several telephone conversations were held in the interim and on the following January 28 we again wrote to counsel seeking the information requested on December 2.

On February 2 the acquiring corporation replied:

"My dear Mr. —: I haven't had a chance to answer your letter of January 28, — because of the hectic last days of my term of office at [State capital].

"I am thoroughly familiar with this transaction and do not feel that we have in any way violated the law. Since I feel this way about it, I am disinclined to give you the information.

"Since I am obliged to so advise my clients, they are disinclined to go to the trouble and expense to furnish the considerable additional information which you request, and I cannot say that I blame them.

"I might add that as to the information which you request in paragraph 1 of your letter of December 2, —, I have already furnished you with the [acquired corporation's] statements, and [the acquiring corporation] being a public company, their financial statements must be readily available to you.

"Sincerely yours,

(Signed.) "———".

On August 4 the matter was referred to the Federal Trade Commission because of the acquired corporation's refusal to cooperate in supplying pertinent information.

## CASE STUDY NO. 10

On October 11, 195-, we wrote the president of a very large corporation seeking certain data and information concerning the purchase by another corporation of a substantial volume of its stock. In the letter we asked that all readily accessible material be submitted while the balance of the requested data was being gathered or compiled. On October 14 a well-known law firm responded, stating they would furnish the information and would submit a timetable on when it would be supplied within 10 days.

On October 23, we wrote the law firm requesting, among other things, all details and documents relating to the appointment of the acquiring corporation's designees to the large corporation's board of directors. This letter also requested available material be supplied while the balance was being assembled. No reply having been received, the law firm on November 2 was asked by telegram when a reply would be forthcoming. Their reply consisted of a telephone call to a member of the Antitrust Division staff stating they desired to confer with us in Washington but that it would be impossible to do so prior to November 19. At this conference the first and only information up to this time as to the changes in the board of directors was submitted in the form of a press release which the large corporation had issued on October 7.

Thus, we waited until November 19 to secure information which had been released to the press on October 7. On December 14, with certain other material, we received a copy of a memorandum concerning a directors meeting held on October 5. On the following January 12 we again wrote the law firm asking for the balance of the information and data requested.



As of that date, 3 months after the initial request, much of the important information we had requested had not yet been supplied, or had been supplied in such inadequate detail as to be of little help.

## CASE STUDY NO. 11

Early in December 195-, the press reported a meeting of stockholders of each of two large competing corporations was to take place on the following January 27, to vote on proposed merger of the two corporations. (One of the corporations the previous year had sales of over \$300 million.)

Subsequent to this announcement counsel for both companies met with Division attorneys to discuss the proposed merger. The attorney representing one of the companies stated the purpose of his visit was not to request a clearance of the merger, but an offer to furnish any information the Department requested. He also indicated he would like a comment from the Department as to whether we would seek to enjoin the merger.

On December 27 a letter of inquiry was sent to this attorney requesting certain information on the proposed merger. The information requested was forwarded to the Department piecemeal and the last of the information requested in this letter arrived at the Antitrust Division on the following January 16. A supplemental letter was forwarded to this attorney requesting additional information on January 18 and the reply to this request arrived in the Antitrust Division on January 30, 3 days after the merger had been consummated.

Thus, even though the attorney volunteered to supply the information, much of it was not received until after the merger had been consummated and consummation of the merger thwarted injunctive possibilities.

## CASE STUDY NO. 12

On September 23, 195-, one of our field offices sent the usual inquiry letter to a large corporation concerning its acquisition of a smaller competitor. Frequently thereafter the field office communicated with the vice president and general counsel of the acquiring corporation regarding the requested and unfurnished information and was told a decision as to whether the information would be supplied was being considered by the corporation.

On November 19 this official appeared at the field office and asked for and received an explanation of all parts of the letter. At that time he stated the matter of whether to supply the information or not was still being considered by the corporation but that one of the congressional committees was absorbing all of the time of the corporation's legal staff. He added he would, however, within a week or two, advise the field office of the corporation's decision. No decision has been communicated to that office and their more recent approaches have met with the same explanation regarding the congressional investigation.

We concluded that the corporation would furnish little, if any of the desired information, and further would delay in giving any definitive reply as to what exactly it would do. Thus, we were forced to find information to the extent we could to evaluate this merger from sources other than the acquiring corporation.

## CASE STUDY NO. 13

On April 16, 195-, the Division wrote to the vice president and secretary of a large corporation concerning the acquisition of a company engaged in the same field, which had just been announced. On April 24 counsel replied the information was being gathered and "will be submitted to you as soon as obtained." On June 24, having heard nothing further, we wrote asking the attorney when we might expect to receive the information. On July 5 we received certain information; on July 19 the acquisition was consummated.

On the following January 21, after gathering what information we could from other sources, our inquiry into this transaction was closed. The memorandum recommending closing stated: "In our several inquiries into [this corporation's] acquisitions, this company has been unable or unwilling to assist us materially."

A prior instance of this company's failure to cooperate voluntarily involved its acquisition of a small corporation in the midwest about which we wrote to the corporation on December 9, 195-. On December 23 the corporation's attorney replied the information will be submitted "as soon as it can be assembled." Later the Wall Street Journal reported the corporation planned to acquire a retail chain.



On March 9 in a letter to the attorney, we combined a request for information regarding the latter acquisition, with a reminder that an appreciable period of time had elapsed since he promised to supply information about the earlier acquisition. On March 12 the company furnished information regarding the Midwest acquisition, and on March 14 the attorney furnished information regarding the retail chain. Thus, the company made a further acquisition prior to furnishing information on an earlier one.

## CASE STUDY NO. 14

On July 22, 195-, we sent an inquiry letter to a corporation concerning a recent acquisition. (The acquiring corporation and another dominate the industry in which they are engaged.) The letter was acknowledged on July 26; and on August 7 a more detailed inquiry letter was sent to the acquiring corporation. This was acknowledged on August 16 and some response to our inquiries was made. The letter, however, stated:

"As to the other information which you requested, we find that it would not only be exceedingly burdensome to compile, but much of it in fact would be impossible to obtain. We are giving this further study however and will be glad to advise you later if we can readily supply answers to some of your other queries."

On December 5 we again wrote the acquiring corporation, referred to the paragraph quoted above, and two specific questions in our August 7 letter about which we felt they should have answers readily available. On the following January 1 they answered the two questions and to date have not supplied us with answers to any other questions.

Thus, we received answers to two questions nearly 5 months after they could have been supplied, and the inadequate response forced us to try to find the information elsewhere. We are still trying (years later.)

## CASE STUDY NO. 15

On December 24, 195-, the press reported a proposed merger involving two corporations in a concentrated industry. On the following January 28 we wrote to the president of the acquiring corporation for information on the transaction. On February 6 a well-known law firm replied that the information was being collected and another letter dated March 19, in answer to our telegram of March 14, stated that a considerable portion of the information had been assembled.

On April 1 the law firm wrote that there would be a delay in replying and asked to meet with us to discuss the matter. On April 10 the company announced it had acquired another corporation. On April 16 we wrote counsel asking that at the conference scheduled for April 24, he be prepared to discuss the later acquisition as well as the earlier merger.

At the conference on April 24 counsel stated the companies were not competitive but could not explain in detail why he thought this was so. He promised to supply some information by letter. He refused to give any information on the relative positions of the companies in the industry as he felt it would be misleading and valueless because based on conjecture and indicated at length his belief that the merger was unobjectionable under the antitrust laws.

On June 13 in answer to our telegram of June 14, counsel phoned to say he hoped to supply some information when he completed litigation he was then engaged in. Our file on this matter has not yet been closed (years later).

## CASE STUDY NO. 16

On June 28, 195-, we sent a letter of inquiry concerning a proposed acquisition of assets in which we requested 11 items of information including a request for drafts, if any, of the proposed purchase agreement.

On July 10 attorneys and officers of the acquiring corporation conferred at the Department. They stated no draft of the proposed agreement existed. They also stated that if there was a serious question of the legality of the acquisition, they would call off all negotiations. They stated they would inform us when and if any agreement was entered into. No documents were supplied.

On July 17 an attorney for the seller of the assets wrote " \* \* \* We now have the subject of your letter under consideration and study. We anticipate

that we will be in touch with you fairly soon for future discussions on the subject." No data were supplied.

On August 6 we read in a trade publication that an agreement had been entered into on August 2. We sent a telegram requesting that they immediately supply us with a copy of the agreement and the data we had requested. The agreement was sent to us on August 8. The covering letter requested a conference be held "after you have had an opportunity to examine the enclosed and the other material which we will submit shortly."

Since the agreement indicated that performance was to begin September 1, we transmitted telegrams to both parties suggesting that a conference be held at once. The next day we received a telephone call from the seller stating their attorney was out of town but that he would arrange a date for the conference the following week.

We heard nothing for 3 weeks when, by telephone, the seller's attorney set September 30 for the previously requested conference. At the conference on September 30 we were for the first time supplied with documents and data, which were requested in our original letter of inquiry dated June 28. The remainder of the data was not supplied until October 23.

In our opinion the data, which were requested in June and which were necessary for the proper evaluation of the August 2 agreement, could have been reasonably supplied within 3 or 4 weeks of the original request.

#### CASE STUDY NO. 17

On or about March 23, 195-, information was received that a corporation supplier of raw materials and a manufacturing corporation which utilized the raw materials were attempting to acquire control of a corporation selling a related product. More specifically, it appeared that certain officers and directors of the supplier and the manufacturer and others associated with them, were making large purchases of the related corporation's stock.

On March 23 and 24, we sent telegrams to those who had been reported as purchasing the stock, requesting pertinent information. Some of the information requested was supplied, some was not. We had asked, *inter alia*, for correspondence and memorandums pertaining to the acquisition by the supplier, the manufacturer and others. Although we made repeated requests for such information, it was not supplied.

On May 11 the counsel for the supplier conferred with us at which time we made further request for correspondence and memorandums. He informed us that the supplier would decline to make the information available "because the documents relate to family problems and that it would be unpleasant to disclose their contents." He further replied that in any event he had examined the documents and they did not indicate to him any purpose on the part of the supplier to acquire a controlling interest in the related corporation. On the same day another attorney also representing the supplier stated there had been some disinclination by the supplier to "open their files" because in the course of recent litigation involving a proxy fight between the management of [related corporation] and the [supplier] group of stockholders, management had from time to time referred to the "investigation" by the Department of Justice as an excuse for not making disclosure of information requested by [the supplier], on one occasion he even implied the [supplier] group of stockholders would be "investigated by the FBI."

The above indicates, obviously, difficulties encountered in attempting to obtain, on a voluntary basis, pertinent information concerning a possible section 7 violation.

Had it been supplied within a reasonable time, we might have been in a position to seek a preliminary injunction prior to the date on which performance of the agreement was to commence.

#### CASE STUDY NO. 18

In January 19— the Wall Street Journal carried an article announcing the acquisition by the largest fully integrated firm in a highly concentrated industry of a corporation which was a large consumer of the acquiring company's products in its fabrication business. On February 1, 19—, we sent a detailed "Inquiry" letter to the executive vice president and counsel of the acquiring company. On February 3, 19—, he responded stating that the available staff was involved in compiling other data for us, but assured "we shall do the best we can and you will have our cooperation as always." On May 4, 19—, a member of the Division

staff called a member of a prominent Washington, D.C., law firm which had been retained by the acquiring corporation in this matter, and asked when we would receive the information requested in our February 1, 19—, letter. This lawyer stated that it was his view that the Department considered all acquisitions made by the acquiring company as violative of the act and that, therefore, he did not think the company should furnish the information and that he would so recommend to his client. He went on to say that he did not believe that the company should provide to the Department information which would help the Government in a suit against the company. He further stated that preparation of materials and data, had gone "a long way" toward completion and if it is decided to furnish the information and materials, their submission to the Department would be made within a short time.

At conferences with representatives of the Division on May 17, 19—, the lawyer stated that the acquiring corporation had decided to change its policy of full cooperation with the Department and under its new policy would submit only information as to sales and products involved, the location of plants, financial statement, and a copy of the acquisition agreement. He stated that the reason the acquiring company changed its mind about cooperating is because he suspected and had so advised the company that the Department had already made up its mind to sue.

By letter dated May 26, 19—, the general counsel of the acquiring corporation transmitted the material the Washington lawyer said the company would make available. The letter stated that no further response to our February 1, 19—, letter was planned.

Thus the acquiring corporation, after first promising full cooperation, 5 months later reneged on its promise and supplied only meager data, in spite of the apparent fact that most if not all of the information we had requested had been compiled by it. The investigation of this matter is continuing but obviously under very difficult circumstances.

#### CASE STUDY NO. 19

The acquisitions in this case have become the subject matter of a section 7 complaint and a discussion of the details in the case would disclose the identity of the companies involved. It can be said, however, that documents which might have been of vital importance in determining the competitive effect of the acquisitions involved were specifically requested by this Division and that these requests were flatly denied.

#### CASE STUDY NO. 20

On May 1, 195—, A, manager of the ——— department, B company, refused information and declined a file search, referring us to the company's attorney, C. C refused cooperation except under grand jury subpoena. On May 2, 195—, D, manager of F company, declined a file search and refused to give us any information. On May 2, 195—, G, manager of H company, refused information and declined a file search. However, G admitted that the correspondence requested was in his files.

On May 6, 195—, I, ——— department, J company, declined information and file search and referred us to the company attorney, K. On May 9, 195—, K said for us to get a subpoena. On May 9, 19—, L, director of M company, denied the existence of a ——— cartel and declined a file search as "pointless" because the correspondence requested did not exist. (Later the company produced considerable pertinent correspondence under a grand jury subpoena.) On May 31, 195—, N, vice president and general manager, O company, refused information and declined a file search on the grounds "there is nothing in the files." (A later grand jury subpoena proved otherwise.)

#### CASE STUDY NO. 21

On November 28, 195—, A, owner of B company, stated that it would be practically impossible to give us the statistical information requested because of "the disorganized condition of his files." On December 3, 195—, C, secretary of D company, refused to give us statistical and sales information because of "clerical expense" and "impossibility."

On February 19, 195—, E, vice president and general manager of F company, stated that on numerous occasions companies had injured his business. When interviewed February 20, 195—, to obtain details concerning his injuries, E said

that after considering the matter further he did not wish to point the finger at anyone and declined further information.

In April 195-, G company, refused statistical and sales information on the grounds that the bookkeeper in charge of such records was absent. Later, on a second trip we were told that the company would furnish the information required if our request were put in writing. We then submitted a written request for information, but the company did not reply to that or subsequent letters of inquiry. Finally, H of this office, telephoned the company long distance and obtained orally part of the sales information requested. On May 16, 195-, I, general manager J company, refused to give us sales and statistical information. Reason: too much work.

#### CASE STUDY NO. 22

On October 195-, an investigation was authorized of the ——— industry, Voluntary file searches were sought at the office of A company and of B company, the principal groups in the industry.

On December 2, 195-, C, president of A company, was requested to permit the FBI to conduct a voluntary file search at the offices of A company. C indicated he was willing to cooperate with the Government, that their files were open, and that interviews of officers would be permitted. However, he stated he wished to clear the matter first with his counsel, and that he would advise us shortly of his decision. On December 11, 195-, we called C by telephone to inquire whether a decision was reached, and he stated he would advise us shortly after December 18, 195-. Subsequently, in February of 195-, the A company submitted a very limited number of documents to the Division in response to specific requests. However, at a conference with D, cocounsel for A company, on October 21, 195-, D stated that it was not in his client's interest to permit a file search at this time, but that he would submit documents to us if we gave him specific written requests indicating by subject matter what documents were desired. D also stated that interviews of personnel would not be permitted until after completion of the requests for documents.

With respect to B company, at a conference on December 1, 195-, E, counsel, and F, assistant manager, E stated he would not allow F to answer any questions, and that under no circumstances would he permit officers or other personnel to be interviewed. With respect to a file search, E stated that he would determine whether information should be furnished to the Division only after he received a specific request for the type of information desired. S stated he was opposed to a broad file search unless he knew specifically what information the Division wanted. He said he would inform us of his final decision by January 9, 195-. No communication was received from E by January 9, but on February 13, 195-, he submitted a limited number of documents in response to a prior specific request from us. On October 21, 195-, E advised us he had not changed his mind with respect to a file search or interviews, and on December 2, 195-, G, cocounsel, advised us that he did not favor further voluntary cooperation in this investigation.

In view of this history of unsuccessful attempts to obtain voluntary cooperation, a compulsory process became necessary to complete the investigation. A grand jury investigation was recently initiated.

#### CASE STUDY NO. 23

In April of 195- an investigation was authorized to determine whether the members of the A association and the B association were engaged in a conspiracy to stabilize prices for ——— and sold by ———. Requests were made for permission to conduct voluntary file searches at the offices of both associations. On August 5, 195-, C, counsel for B association, and special counsel for D, stated that because of pending litigation in the State courts involving the same subject matter he anticipated that a complaint would be made to the Department of Justice. Since he was of the opinion that the antitrust inquiry stemmed from some complaint arising out of the State litigation, C stated that he would advise the appropriate officials of each association not to voluntarily release the records of the association to the Department since this might "set up a defense for a pending law suit through the cooperation of the Federal Government."

In view of the refusal of both associations to grant access to their files, the necessary information required to this investigation can be obtained only through compulsory process. On January 12, 196-, the Attorney General authorized the Division to present this to a grand jury.

## CASE STUDY NO. 24

On September 6, 195-, an FBI investigation of A company was undertaken for possible cartel arrangements and patent abuses relating to ——— and ———. Difficulty had already been encountered prior to this time in obtaining from A company copies of pertinent licensing agreements. By letter of September 30, 195-, B, counsel for A company requested limitation of the scope of the FBI investigation. On October 10, 195-, we requested B to contact C of our staff for discussion of the matter. When B made no response, we asked the FBI on December 2, 195-, to proceed with the investigation. In April of 195- A company refused access on the grounds that B had furnished the desired information. We advised B to the contrary on May 16, 195-. On May 20, 195-, we again asked the FBI to return to A company and make the search. On December 23, 195-, request for a status report developed that A company had told the FBI through D, assistant secretary and treasurer, that the company was furnishing D, the information direct to the Antitrust Division through B. B had made no contact with the Division in the interim. On February 18, 195-, we met with B and, following the meeting, wrote a letter to him limiting the scope of the investigation sharply, but insisting that we still might need all of the information originally requested. On March 11, 195-, we dispatched a new request to the Bureau asking that they conduct the more limited search. Thereafter, some material was furnished, but additional material was demanded in compliance with the agreement to limit the scope by a letter of May 28, 195-, to B. Finally, we learned on January 13, 196-, that A company was finally prepared to submit the remainder of the material.

We are requesting the Bureau to complete the search (as limited) as soon as possible. However, after 2 years and 3 months we still do not have compliance with a sharply limited investigation.

## CASE STUDY NO. 25

On January 6, 195-, A of our office reported that the following companies had refused permission to the Federal Bureau of Investigation to review their files: B, C, D, E, F, G, and H companies.

I, attorney for E company, and G company declined file searches, saying that his clients "would not benefit by cooperating with us." The attorney for C company refused on the grounds of "bad relations" with the Antitrust Division in that in a former investigation he had allowed a file search and his clients had later been indicted. As a result of these refusals the investigation was stymied and we issued a request for grand jury authority in May 195- which request was recently renewed.

## CASE STUDY NO. 26

On January 29, 195-, the Antitrust Division requested an investigation of the ——— industry. The principal company against which complaint was made is A company.

On March 3, 195-, agents of the Federal Bureau of Investigation discussed with B and C, attorneys associated with the firm of ———, patent attorneys representing A company, the information desired by the Antitrust Division and the documents which we wished to be produced pursuant to a file search.

Messrs. B and C advised that an examination of files by special agents of the FBI was not desirable insofar as A company was concerned and would not be permitted. They requested that, due to the volume and detailed nature of the information desired from A company, a written list of questions, setting forth exactly what information was desired, be furnished them. They advised further that upon receipt of a written listing setting forth what information was desired and what specific documents and other material were to be examined, arrangements would be made for the review of this material by special agents of the FBI.

In view of the fact that the complaint against A company involved possible violation of sections 1 and 2 of the Sherman Act, it was felt that a grand jury investigation would be desirable to obtain the documentary information originally sought through the file search by the FBI.

## CASE STUDY NO. 27

Complaints against A company, were made by ——— concerning a requirement by A company that its wholesalers carry a full line of its products and maintain A company's suggested prices "all the way through to the retailer". In addition, it was claimed that A company uses a "shopper" system whereby a person employed by A company poses as a customer and approaches A company's distribution outlets for the purpose of determining whether the wholesaler will cut the A company's suggested prices. On August 19, 195—, the Antitrust Division requested an FBI investigation.

On October 16, 195—, B, president of A company, was contacted by the FBI. The company's attorney was also present. B, after being advised of the nature of the information desired, stated he would have his attorney submit to the ——— office of the FBI, by letter, the information requested by the Antitrust Division. B and C insisted that they would provide the information by letter only.

Subsequently, B and his attorney furnished most of the information requested. He stated, however, on November 26, 195—, that although he would permit a file review of correspondence between A company and its distributors and various dealers and individuals, he would not permit a file review of intracompany correspondence under any circumstances.

We are contemplating requesting grand jury authority for the purpose of obtaining the documents which would have been produced during the FBI file search, together with such other information as may be pertinent to the investigation.

(A grand jury has not previously been requested since the FBI was continuing its investigation through interviews with ——— and it was believed desirable to wait until the FBI had completed its investigation before grand jury authority it requested. The FBI has now completed its investigation.)

## CASE STUDY NO. 28

In June 195—, the ——— office of the Antitrust Division began an investigation into the activities of A company, which had allegedly engaged in restrictive practices in the ——— industry. Thereafter an agent of the FBI called on A company. B, vice president of A company, said his company "desires to cooperate" but first wished answers to the following questions as background information:

1. Has a specific complaint been made against A company?
2. If a complaint has been made, by whom?
3. What is the nature of the complaint, if one has been made?
4. Has investigation of complaint as alleged been substantiated?

B's questions were not, of course, answered. A grand jury investigation was authorized on June 8, 195—. This investigation determined that a civil action charging violation of section 1 of the Sherman Act would be more appropriate than a criminal suit. A complaint was filed on December 30, 195—, and, on the same date, a consent judgment was entered in which A company agreed to terminate the alleged unlawful practice.

## CASE STUDY NO. 29

The FBI was requested to investigate alleged violations of the Sherman Act by two companies engaged in the manufacture and sale of a certain commodity. A competitor of the companies investigated was requested to make its files available for examination by the FBI. The vice president and general counsel of the company replied by letter, "It is contrary to the established policy of this company to grant permission for the examination of its records and files and in view of this fact, I am unable to comply with the request in your letter of April 18."

## EXTRACTS DELEGATING VISITORIAL POWER TO STATE ATTORNEYS GENERAL RE STATE ANTITRUST ENFORCEMENT

## ARIZONA

[Arizona Revised Statutes Annotated, vol. 14, pp. 530, 535]

## ARTICLE 1. COMBINATIONS IN RESTRAINT OF TRADE

§ 44-1401. Trust defined; unlawful purposes; monopoly or attempt to create monopoly prohibited.

\* \* \* \* \*

§ 44-1407. Subpoena of witnesses by superior court upon application of attorney general or county attorney; examination; immunity from prosecution; perjury.

A. The superior court shall, upon good cause shown and upon written application of the county attorney or attorney general, cause issuance and service of subpoenas upon witnesses named in the application, for the appearance in court of such witnesses. The witnesses shall testify to any knowledge they have of a violation of this article.

E. Any person subpoenaed and examined as provided by this section shall not be liable to criminal prosecution for the violation of this article about which he testifies, \* \* \*.

## ANTITRUST LAW OF HAWAII

[H.B. No. 27, H.D. 2, S.D. 2, C.D. 1]

## SECTION 16. INVESTIGATION

(1) Whenever it appears to the attorney general, either upon complaint or otherwise, that any person or persons, has engaged in or engages in or is about to engage in any act or practice by this Act prohibited or delivered to be illegal, or that any person or persons, has assisted or participated in any plan, scheme, agreement or combination of the nature described herein, or whenever he believes it to be in the public interest that an investigation be made, he may in his discretion either require or permit such complaint to file with him a statement in writing under oath or otherwise as to all the facts and circumstances concerning the subject matter which he believes to be in the public interest to investigate. The attorney general may also require such other data and information from such complainant as he may deem relevant and may make such special and independent investigations as he may deem necessary in connection with the matter.

(2) Whenever the attorney general has reason to believe that any person may be in possession, custody, or control of any documentary material, objects, tangible things or information (hereinafter referred to as "documentary evidence") pertinent to any investigation of a possible violation of this Act and before the filing of any complaint in court, he may issue in writing, and cause to be served upon such person, an investigative demand requiring such person to produce such documentary evidence for examination.

(3) Each such demand shall:

(a) state that an alleged violation of the section or sections of this Act which are under investigation;

(b) describe and fairly identify the documentary evidence to be produced, or to be answered;

(c) prescribe a return date within a reasonable period of time during which the documentary evidence demanded may be assembled and produced;

(d) identify the custodian to whom such documentary evidence are to be delivered; and

(e) specify a place at which such delivery is to be made.



(4) No such demand shall :

(a) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of this State in aid of a grand jury investigation of such possible violation ; or

(b) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of this State in aid of a grand jury investigation of such possible violation.

(5) Any such demand may be served by any attorney employed by or other authorized employee of this State at any place withing the territorial jurisdiction of any court of this State.

(6) Service of any such demand or of any petition filed under subsection 15 of this section, may be made upon a partnership, trust, corporation, association, or other legal entity by :

(a) delivering a duly executed copy thereof to any partner, trustee, executive officer, managing agent, or general agent thereof, or to any agent, thereof authorized by appointment or by law to receive service or process on behalf of such partnership, trust, corporation, association, or entity ; or

(b) delivering a duly executed copy thereof to the principal office or place of business in this State of the partnership, trust, corporation, association, or entity to be served ; or

(c) depositing such copy in the United States mails, by registered or certified mail duly addressed to such partnership, trust, corporation, association or entity at its principal office or place of business in this State.

(7) A verified return by the individual service any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand or petition.

(8) The attorney general shall designate a representative to serve as custodian of any documentary evidence, and such additional representatives as he shall determine from time to time to be necessary to serve as deputies to such officer.

(9) Any person upon whom any demand issued under subsection (2) has been duly served shall deliver such documentary evidence to the custodian designated therein at the place specified therein (or at such other place as such custodian thereafter may prescribe in writing on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). No such demand or custodian may require delivery of any documentary evidence to be made :

(a) at any place outside the territorial jurisdiction of this State without the consent of the person upon whom such demand was served ; or

(b) at any place other than the place at which such documentary evidence is situated at the time of service of such demand until the custodian has tendered to such person a sum sufficient to defray the cost of transporting such material to the place prescribed for delivery or the transportation thereof to such place at government expense.

(10) The custodian to whom any documentary evidence is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this section. The custodian shall issue a receipt for such evidence received. The custodian may cause the preparation of such copies of such documentary evidence as may be required for official use by any individual who is entitled, under regulations which shall be promulgated by the attorney general, to have access to such evidence for examination. While in the possession of the custodian, no such evidence so produced shall be available for examination, without the consent of the person who produced such evidence, by any individual other than a duly authorized representative of the office of the attorney general. Under such reasonable terms and conditions as the attorney general shall prescribe, documentary evidence while in the possession of the custodian shall be available for examination by the person who produced such evidence or any duly authorized representative of such person.

(11) Whenever any attorney has been designated to appear on behalf of this State before any court or grand jury in any case or proceeding involving any alleged violation of this Act, the custodian may deliver to such attorney such documentary evidence in the possession of the custodian as such attorney deter-



mines to be required for use in the presentation of such case or proceeding on behalf of this State. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary evidence so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(12) Upon the completion of the investigation for which any documentary evidence was produced under this section, and any case or proceeding arising from such investigation, the custodian shall return to the person who produced such evidence all such evidence (other than copies thereof made by the attorney general or his representative pursuant to subsection (10) of this section) which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(13) When any documentary evidence has been produced by any person under this section for use in any investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the court of such investigation, such person shall be entitled, upon written demand made upon the attorney general to the return of all documentary evidence (other than copies thereof made by the attorney general or his representative pursuant to subsection (10) of this section) so produced by such person.

(14) In the event of the death, disability, or separation from service in the office of the attorney general of the custodian of any documentary evidence produced under any demand issued under this section, or the official relief of such custodian from responsibility for the custody and control of such evidence, the attorney general shall promptly designate another representative to serve as custodian thereof, and transmit notice in writing to the person who produced such evidence as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such evidence all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(15) Whenever any person fails to comply with any investigative demand duly served upon him under subsection (6) of this section, the attorney general, through such officers or attorneys as he may designate, may file in the district court of any county in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of such demand, except that if such person transacts business in more than one such county such petition should be filed in the county in which such person maintains his principal place of business, or in such other county in which such person transacts business as may be agreed upon by the parties to such petition. Such person shall be entitled to be heard in opposition to the granting of any such petition.

(16) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file in the district court of the county within which the office of the custodian designated therein is situated, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section, or upon any constitutional right or privilege of such person.

If the court does not set aside such demand, such person shall be assessed court cost and reasonable attorneys' fees and such other penalties not greater than those specified under Section 14 of this Act. If the Court sets aside such demand, such person shall be given the total cost of such petition.

(17) At any time during which any custodian is in custody or control of any documentary evidence delivered by any person in compliance with any such demand, such person may file in the district court of the county within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(18) Whenever the attorney general has reason to believe that any person has information pertinent to any investigation of a possible violation of this Act and before the filing of any complaint in court, he may seek a subpoena from the clerk of the district court in the county where such person resides, is found or transacts business, requiring his presence to appear before a district magistrate licensed to practice law in the Supreme Court of this State to give oral testimony under oath on a specified date, time and place. The clerk of the district court may also issue a subpoena duces tecum under like conditions at the request of the attorney general. Any witness subpoenaed shall be entitled to be represented by counsel and any subpoena shall state the alleged violation of the section or sections of this Act. The scope and manner of examination shall be in accordance with the rules governing depositions as provided in the Hawaii Rules of Civil Procedure. The person subpoenaed may at any time before the date specified for the taking of the oral testimony, move to quash any subpoena before said district magistrate from whose court any subpoena was issued for such grounds as may be provided for quashing a subpoena in accordance with the rules governing depositions as the Hawaii Rules of Civil Procedure.

(19) No person shall be excused from attending an inquiry pursuant to the mandates of a subpoena, or from producing any documentary evidence, or from being examined or required to answer questions on the ground of failure to tender or pay a witness fee or mileage unless demand therefore is made at the time testimony is about to be taken and as a condition precedent to offering such production or testimony and unless payment thereof be not thereupon made. The provisions for payment of witness fee and mileage do not apply to any officer, director or person in the employ of any person or persons whose conduct or practices are being investigated. No person who is subpoenaed to attend such inquiry, while in attendance upon such inquiry, shall, without reasonable cause, refuse to be sworn or to answer any question or to produce any book, paper, document, or other record when ordered to do so by the officer conducting such inquiry, or fail to perform any act hereunder required to be performed.

(20) Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part, by any person with any investigative demand made under this section, wilfully removes from any place, conceals, withholds, destroys, mutilates, alters, or by any other means falsifies any documentary evidence in the possession, custody or control of any person which is the subject of any such demand duly served upon any person shall be fined not more than \$5,000.00 or imprisoned not more than one year, or both. Any person wilfully failing to comply with a subpoena issued pursuant to subsection (18) of this section shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(21) Nothing contained in this section shall impair the authority of the attorney general or his representatives to lay before any grand jury impaneled before any circuit court of this State any evidence concerning any alleged violation of this Act, invoke the power of any such court to compel the production of any evidence before any such grand jury, or institute any proceedings for the enforcement of any order or process issued in execution of such power, or to punish disobedience of any such order or process by any person.

(22) As used in this section the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document.

(23) It shall be the duty of all public officers, their deputies, assistants, clerks, subordinates and employees to render and furnish to the attorney general, his deputy or other designated representatives when so requested, all information and assistance in their possession or within their power.

(24) Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall wilfully disclose to any person other than the attorney general the name of any witness examined as a witness upon such inquiry or any other information obtained upon such inquiry, except as so directed by the attorney general shall be punishable by a fine of not more than \$1,000 or imprisonment for not more than one year, or both.

(25) The enumeration and specification of various processes do not preclude or limit the use of processes under the Hawaii Rules of Civil Procedure but are deemed to be supplementary to said rules or the use of any other lawful investigative methods which are available.

## IDAHO

[Idaho Code, vol. 8, pp. 588, 591]

## TITLE 48. MONOPOLIES

§ 48-101. Combination in restraint of trade illegal—Penalty.

\* \* \* \* \*

§ 48-105. Books subject to inspection.

All the books of record and papers of every corporation, joint stock company, or other association, engaged in business within this state shall be subject to inspection by the attorney-general of this state, or by any agent he may designate for that purpose, and such corporation, joint stock company, or other association shall, at such times as he shall prescribe, make such returns duly verified by an officer of such corporation, joint stock company or association, as shall be by him prescribed either by general regulations or by special direction [1911, ch. 215, § 5, p. 688].

## KANSAS

[Central Statutes of Kansas Annotated, 1949, pp. 1452, 1461]

## CHAPTER 50. MONOPOLIES AND UNFAIR TRADE

§ 50-101. Trusts defined and declared unlawful and void.

\* \* \* \* \*

§ 50-153. Investigations and inquiries by attorney general; penalty for disobedience of process or refusal to testify.

Whenever, the attorney general or assistant attorney general shall have knowledge of any violation of any of the provisions of any of the laws of the state of Kansas relating to trusts, monopolies, combinations in restraint of trade, unlawful discrimination, unfair trade or the unlawful buying, selling and dealing in commodities without the intention of delivering the same, \* \* \*.

\* \* \* \* \*

\* \* \* Such subpoenas may direct witnesses to bring with them any papers, documents and books that may be considered material, and may be served by any person and shall be served and returned to said attorney general, assistant attorney general or justice of the peace or judge, as the case may be. \* \* \* (L. 1919, ch. 316, § 1).

## LOUISIANA

[Louisiana Revised Statutes of 1950, pp. 572, 579, 580]

## PART IV. MONOPOLIES

§ 122. Contracts, combinations and conspiracies in restraint of trade illegal; penalty.

\* \* \* \* \*

§ 143. Discovery; application for order; notice.

The Attorney General or district attorney acting under him, or the governor, before beginning an action under this Part may present to the court a written application for an order directing any person, as the Attorney General or district attorney requires, to appear before any judge, clerk of court, or notary public designated in the order, and answer relevant and material questions put to them concerning any illegal contract, combination, or conspiracy in restraint of trade or commerce, or to create a monopoly under this Part, \* \* \*.

\* \* \* \* \*

§ 144. Discovery ; order ; production of books, papers, etc.

The order for examination shall be signed by the judge making it, and the service of a copy with an endorsement signed by the Attorney General or district attorney that the person named shall appear and be examined. \* \* \*

The endorsement may require the person to produce on examination all books, papers and documents in his possession or under his control, relating to the subject of such examination. \* \* \* (Source: Acts 1915, Ex. Sess., No. 12, § 2.)

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## MAINE

[Revised Statutes of Maine—1954, p. 228]

### MONOPOLIES AND PROFITEERING

Sec. 43. Contracts in restraint of trade.

Sec. 48. Attorney general to investigate.

The attorney general upon his own initiative \* \* \* shall investigate \* \* \* all contracts, combinations or conspiracies in restraint of trade or commerce, and all monopolies, and may require \* \* \* the production of books and papers before him relating to any such matter under investigation. \* \* \*

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## MISSOURI

[Vernon's Annotated Missouri Statutes vol. 21, pp. 848, 849, 898, 889]

### CHAPTER 416. MONOPOLIES, DISCRIMINATIONS AND CONSPIRACIES

Sec. 416.010. Combination in restraint of trade declared a conspiracy.

Sec. 416.310. Procedure for securing testimony.

Whenever the attorney general deems it necessary or proper before beginning any action or proceeding against any pool, trust, conspiracy or combination made, arranged, agreed upon or entered into whereby a monopoly in the manufacture, production or sale in this state of any article or commodity is or may be sought to be created, established or maintained, or whereby competition in this state in the supply or price of any article of commodity is or may be restrained or prevented, then in such case the attorney general may present to any justice of the supreme court an application in writing, for an order directing such persons, as the attorney general may require, to appear before a justice of the supreme court \* \* \*

\* \* \* Such endorsement may contain a clause requiring such persons to produce on such examination all books, papers and documents in his possession or under his control relating to the subject of such examination ; \* \* \*.

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## MONTANA

[Revised Codes of Montana—1947, Annotated, vol. 8, p. 42]

### CRIMES AND CRIMINAL PROCEDURE

§ 94-1108. Prosecutions by attorney general.

If complaint shall be made to the attorney general that any corporation is guilty of unfair discrimination, as defined by this act, he shall forthwith investigate such complaint, and for that purpose he shall subpoena witnesses, administer oaths, take testimony, and require the production of books or other documents, \* \* \*. (History: En. Sec. 2, Ch. 8, L. 1913.)

## NEBRASKA

[Revised Statutes of Nebraska—1943, vol. 3A, pp. 1038, 1039]

## MONOPOLIES AND UNLAWFUL COMBINATIONS

§ 59-804. Business of corporations, other associations; conduct; investigation by Attorney General; powers.

The Attorney General of this state \* \* \* may especially require any such corporation, joint stock company or other association, to give a list of all contracts or transactions entered into within the twelve months preceding such requisition, \* \* \*. (Source: Laws 1905, c. 162, § 5, p. 638.)

\* \* \* \* \*

§ 59-807. Books, papers, records; inspection by Attorney General.

All the books of record and papers of every such corporation, joint stock company or other association engaged in business within this state, shall be subject to inspection by the Attorney General of this state, or by any agent he may designate for that purpose, \* \* \*. (Source: Laws 1905, c. 162, § 8, p. 639.)

## NEW YORK

[McKinney's Consolidated Laws of New York, Annotated—Book 19, General Business Law, pp. 297, 342, 343]

## ARTICLES 22. MONOPOLIES

§ 340. Contracts or agreements for monopoly or in restraint of trade illegal and void.

\* \* \* \* \*

§ 343. Investigation by the attorney general.

Whenever it shall appear to the attorney general, either upon complaint or otherwise, that any person or persons, partnership, corporation, company, trust or association shall have engaged in or engages in or is about to engage in any act or practice by this article prohibited or declared to be illegal.

\* \* \* \* \*

The attorney general, his deputy, assistant, or other officer designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate, a court of record or a judge or justice thereof, and require the production of any books, or papers which he deems relevant or material to the inquiry. \* \* \*

## NORTH CAROLINA

[General Statutes of North Carolina, vol. 2B, pp. 768, 773]

## CHAPTER 75. MONOPOLIES AND TRUSTS

§ 75-1. Combinations in restraint of trade illegal.

\* \* \* \* \*

§ 75-9. Duty of Attorney General to investigate.

The Attorney General of the State of North Carolina shall have power, and it shall be his duty, to investigate, from time to time, the affairs of all corporations doing business in the State, which are or may be embraced within the meaning of the statutes of this State defining and denouncing trusts and combinations against trade and commerce, \* \* \*.

\* \* \* \* \*

§ 75-10. Power to compel examination.

In performing the duty required in § 75-9, the Attorney General shall have power, at any and all time, to require the officers, agents or employees of any

## CIVIL INVESTIGATIVE DEMAND

and caused him and all other persons having knowledge with respect to the  
the corporation and affairs of such corporation, to submit themselves to examination  
to him and produce for his inspection any of the books and papers of any such  
corporation or which are in any way connected with the business thereof;  
\* \* \* 1921 C. 41, s. 9; C.S., s. 236S).

### OKLAHOMA

[Oklahoma Statutes Annotated, titles 71-81, pp. 658, 659]

#### CHAPTER 2. UNFAIR DISCRIMINATION OR COMPETITION

§ 82. Investigations of corporations—Actions—Revocation of charters and permits.

If complaint shall be made to the Attorney General that any corporation is guilty of unfair discrimination, as defined by this act (Sections 81-87 of this title), he shall investigate such complaint and for that purpose he may subpoena witnesses, administer oaths, take testimony and require the production of books or other documents, \* \* \* (Comp. St. 1921, § 11040).

### SOUTH CAROLINA

[Code of Laws of South Carolina—1952, vol. 6, pp. 808, 817]

#### CHAPTER 2. TRUSTS, MONOPOLIES AND UNFAIR COMPETITION

§ 66-112. Application for discovery.

Whenever the Attorney General has determined to commence an action or proceeding under any law relating to the prohibition or prevention of trusts, combinations or monopolies or against any corporation, foreign or domestic, for any violation of any law, he may present to any justice of the Supreme Court or any circuit judge, either before or after beginning such action \* \* \* in such order and answer such questions as may be put to them or to any of them and produce such papers, documents and books concerning any alleged illegal contract, arrangement, agreement, trust, monopoly or combination or corporate acts in violation of law. \* \* \* (1902 (23) 1961).

### TEXAS

[Vernon's Civil Statutes of the State of Texas Annotated, vol. 20, pp. 875, 921]

#### TITLE 126. TRUSTS—CONSPIRACIES AGAINST TRADE

Art. 7439. 7810. Evidence preliminary to prosecutions.

Upon the application of the Attorney General, or of any of his assistants, or of any district or county attorney, acting under the direction of the Attorney General made to any county judge or any justice of the peace in this State, stating that he has reason to believe \* \* \* knows of a violation of any provision of the preceding subdivision, it shall be the duty of such county judge or justice to have summoned as in criminal cases and to have examined such witness in relation to violations of any provision of said subdivision \* \* \* (Derivation: From Vernon's Civ. St. 1914, Rev. Civ. St. 1911, art. 7810.)

## UTAH

[Utah Code Annotated—1953, vol. 8, pp. 479, 480]

## CHAPTER 58. TRADE AND COMMERCE

## § 76-58-1. Fraudulent practices to affect market prices.

## § 76-58-3. Violations by corporations—Attorney general to prosecute.

If complaint is made to the attorney general that any corporation is guilty of unfair discrimination as defined by the preceding section, he shall investigate such complaint, and for that purpose he may subpoena witnesses, administer oaths, take testimony, and require the production of books or other documents, \* \* \*. (History: L. 1913, ch. 41.)

## WASHINGTON

[Washington Laws of 1961, ch. 216, approved Mar. 20, 1961, effective June 8, 1961]

SEC. 11(1) Whenever the attorney general believes that any person may be in possession, custody, or control of any original or copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate, which he believes to be relevant to the subject matter of an investigation of a possible violation of section 3, 4, 5, or 6 of this act, he may, prior to the institution of a civil proceeding thereon, execute in writing and cause to be served upon such a person, a civil investigative demand requiring such person to produce such documentary material and permit inspection and copying: *Provided*, That this section shall not be applicable to criminal prosecutions.

## (2) Each such demand shall:

(a) State the statute and section or sections thereof, the alleged violation of which is under investigation, and the general subject matter of the investigation;

(b) Describe the class or classes of documentary material to be produced thereunder with reasonable specificity so as fairly to indicate the material demand;

(c) Prescribe a return date within which the documentary material is to be produced; and

(d) Identify the members of the attorney general's staff to whom such documentary material is to be made available for inspection and copying.

## (3) No such demand shall:

(a) Contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of this state; or

(b) Require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of this state.

## (4) Service of any such demand may be made by:

(a) Delivering a duly executed copy thereof to the person to be served, or, if such person is not a natural person, to any officer of the person to be served; or

(b) Delivering a duly executed copy thereof to the principal place of business in this state of the person to be served; or

(c) Mailing by registered or certified mail a duly executed copy thereof addressed to the person to be served at the principal place of business in this state, or, if said person has no place of business in this state, to his principal office or place of business.

(5) Documentary material demanded pursuant to the provisions of this section shall be produced for inspection and copying during normal business hours at the principal office or place of business of the person served, or at such other times and places as may be agreed upon by the person served and the attorney general.

(6) No documentary material produced pursuant to a demand, or copies thereof, shall, unless otherwise ordered by a superior court for good cause shown, be produced for inspection or copying by, nor shall the contents thereof be disclosed to, other than an authorized employee of the attorney general, without the consent of the person who produced such material: PROVIDED, That, under such reasonable terms and conditions as the attorney general shall prescribe, the copies of such documentary material shall be available for inspection and copying by the person who produced such material or any duly authorized representative of such person. The attorney general or any assistant attorney general may use such copies of documentary material as he determined necessary in the enforcement of this act, including presentation before any court: PROVIDED, That any such material which contains trade secrets shall not be presented except with the approval of the court in which action is pending after adequate notice to the person furnishing such material.

(7) At any time before the return date specified in the demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date for, or to modify or set aside a demand issued pursuant to subsection (1), stating good cause, may be filed in the superior court for Thurston County, or in such other county where the parties reside. A petition, by the person on whom the demand is served, stating good cause, to require the attorney general or any person to perform any duty imposed by the provisions of this section, and all other petitions in connection with a demand, may be filed in the superior court for Thurston County, or in the county where the parties reside.

(8) A person upon whom a demand is served pursuant to the provisions of this section shall comply with the terms thereof unless otherwise provided by order of court issued under subsection (7) hereof. Any person who, with intent to avoid, evade or prevent compliance, in whole or in part, with any civil investigative demand under this section, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody, or control of any person which is the subject of any demand duly served upon any person shall be guilty of an offense against the state, and shall be subject, upon conviction, to a fine not to exceed five thousand dollars or to imprisonment for a term of not more than one year, or both.

## WISCONSIN

[West's Wisconsin Status Annotated, Secs. 128 to 146, pp. 160, 173, 185]

### CHAPTER 133. TRUSTS AND MONOPOLIES

#### § 133.0. Unlawful contracts; conspiracies.

#### § 133.06. Inquisitorial proceeding.

(1) Whenever the attorney-general files with any circuit court commissioner a statement that he has reason to believe and does believe that a contract, agreement, combination, trust or conspiracy in restraint of trade as defined by section 133.01 or 133.21 exists or that a violation of either of said sections has occurred said commissioner shall issue his subpoena for the persons requested by the attorney-general.

(2) The testimony shall be taken by a stenographic reporter, \* \* \*

#### § 133.22. Duty of attorney-general

Whenever the attorney-general shall be notified or have reason to believe that any such corporation has violated any provision of section 133.21 it shall be his duty forthwith to address to any such corporation or to any director or officer



thereof such inquiries as he may deem necessary for the purpose of determining whether or not such corporation has violated any provision of said section, and it shall be the duty of such corporation, director or officer so addressed to promptly and fully answer in writing, under oath, such inquiries; \* \* \*.

# EXTRACTS DELEGATING VISITORIAL POWERS TO FEDERAL OFFICIALS RE ENFORCEMENT RESPONSIBILITIES

## SECRETARY OF AGRICULTURE

[United States Code Annotated, title 7, p. 24]

### CHAPTER 1.—COMMODITY EXCHANGES

#### § 7a. Duties of contract markets.

(2) Access for inspection of books and records.

Allow inspection at all times by an authorized representative of the United States Department of Agriculture or United States Department of Justice of the books, records, and all minutes and journals of proceedings of such contract market, its governing board and all committees, and of all subsidiaries and affiliates of such contract market, which books, records, minutes, and journals of proceedings shall be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct; \* \* \*.

[United States Code Annotated, title 7, p. 723]

### CHAPTER 35. AGRICULTURAL ADJUSTMENT ACT OF 1938

#### § 1373. Reports and records—Persons reporting.

(a) This subsection shall apply to warehousemen, processors, and common carriers of corn, wheat, cotton, rice, peanuts, or tobacco, and all ginnerers of cotton, all persons engaged in the business of purchasing corn, wheat, cotton, rice, peanuts, or tobacco from producers, all persons engaged in the business of redrying, prizing, or stemming tobacco for producers, all brokers and dealers in peanuts, all agents marketing peanuts for producers, or acquiring peanuts for buyers and dealers, and all peanut growers' cooperative associations, all persons engaged in the business of cleaning, shelling, crushing, and salting of peanuts and the manufacture of peanut products, and all persons owning or operating peanut-picking or peanut-threshing machines. Any such person shall, from time to time on request of the Secretary, report to the Secretary \* \* \*.

For the purpose of ascertaining the correctness of any report made or report kept, or of obtaining information required to be furnished in any report, but not so furnished, the Secretary is authorized to examine such books, papers, records, accounts, correspondence, contracts, documents, and memoranda as he has reason to believe are relevant and are within the control of such person \* \* \*.

[United States Code Annotated, title 7, p. 799]

### CHAPTER 37. SEEDS

#### § 1571. Prohibitions relating to interstate commerce in certain seeds

#### § 1603. Procedural powers; witness fees and mileage

(a) In carrying on the work herein authorized, the Secretary of Agriculture, or any officer or employee designated by him for such purpose, shall have power to hold hearings, administer oaths, sign and issue subpoenas, examine witnesses, take depositions, and require the production of books, records, accounts, memoranda, and papers, and have access to office and warehouse premises \* \* \*.

## SECRETARY OF THE ARMY

[United States Code Annotated, title 33, p. 226]

## CHAPTER 11.—BRIDGES OVER NAVIGABLE WATERS

§ 503. Tolls; reasonableness; bridges to which provisions not applicable

\* \* \* \* \*

§ 504. Same; determination of reasonableness by Secretary of the Army; effect of order prescribing toll

\* \* \* \* \*

§ 505. Same; review of order

\* \* \* \* \*

§ 506. Same; hearings to determine reasonableness; attendance of witnesses; punishment for failure to attend

In the execution of his functions under sections 504 and 505 of this title and this section the Secretary of the Army, or any officer or employee designated by him, is authorized to hold hearings, examine witnesses, and receive evidence at any place designated by him, and to administer oaths and affirmations, and require by subpoena the attendance and testimony of witnesses and the production of books, papers, and documents from any place in the United States \* \* \*.

## SECRETARY OF LABOR

[United States Code Annotated, titles 5 and 6, p. 409]

## CHAPTER 15.—COMPENSATION FOR INJURIES TO EMPLOYEES OF UNITED STATES

§ 780. Subpoenas for witnesses

The Secretary shall have power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles, to require the production of books, papers, documents, and other evidence, to administer oaths, and to examine witnesses, upon any matter within the jurisdiction of the Secretary \* \* \*.

## SECRETARY OF THE TREASURY

[United States Code Annotated, title 31, pp. 409, 476]

## CHAPTER 10.—THE PUBLIC MONEYS

§ 478. Member banks as depositaries

Nothing in sections 478-479 of this title shall be construed to deny the right of the Secretary of the Treasury to use member banks of the Federal reserve system as depositaries as authorized by law. May 29, 1920, c. 214, § 41 Stat. 665.

\* \* \* \* \*

§ 548. Examination of depositaries

The Secretary of the Treasury is authorized to cause examinations to be made of the books, accounts, and money on hand, of the several depositaries; and for that purpose to appoint special agents, as occasion may require, with such compensation, not exceeding \$6 per day and traveling expenses, as he may think reasonable, to be fixed and declared at the time of each appointment. The agent selected to make these examinations shall be instructed to examine as well the books, accounts, and returns of the officer, as the money on hand, and the manner of its being kept, to the end that uniformity and accuracy in the accounts, as well as safety to the public moneys, may be secured thereby. R.S. § 3649.

[United States Code Annotated, title 26, pp. 32-33]

CHAPTER 78.—DISCOVERY OF LIABILITY AND ENFORCEMENT OF TITLE

§ 7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry. Aug. 16, 1954, 9:45 a.m. E.D.T., c. 736, 68A Stat. 901.

DIRECTOR, NATIONAL SCIENCE FOUNDATION

[United States Code Annotated, title 42, p. 21]

CHAPTER 16.—NATIONAL SCIENCE FOUNDATION

§ 1862. Functions; reports.

\* \* \* \* \*

§ 1872a. \* \* \*

\* \* \* \* \*

(f) (1) The Director of the Foundation may obtain by regulation, subpoena, or otherwise such information in the form of testimony, books, records, or other writings, may require the keeping of and furnishing such reports and records, and may make such inspections of the books, records, and other writings and premises or property of any person or persons as may be deemed necessary or appropriate by him to carry out the provisions of section 1862(a) (9) of this title, but this authority shall not be exercised if adequate and authoritative data are available from any Federal agency. \* \* \*

ADMINISTRATOR, VETERANS' ADMINISTRATION

[United States Code Annotated, title 38, p. 187]

CHAPTER 57.—RECORDS AND INVESTIGATIONS; SUBCHAPTER II.—INVESTIGATIONS

§ 3311. Authority to issue subpoenas

For the purposes of the laws administered by the Veterans' Administration, the Administrator, and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Veterans' Administration. \* \* \*

## FEDERAL TRADE COMMISSION

[United States Code Annotated, title 15, p. 159]

## CHAPTER 2.—FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND PREVENTION OF UNFAIR METHODS OF COMPETITION

§ 41. Federal Trade Commission established; membership; vacancies; seal

\* \* \* \* \*

§ 49. Documentary evidence; depositions; witnesses

For the purposes of sections 41-46 and 47-58 of this title, the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation, being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

MR. MALETZ. Now, isn't it correct that at the commencement of a Sherman Act investigation, it is not possible for the Department of Justice to know whether a criminal or civil proceeding or both might be brought?

MR. KENNEDY. That is correct.

MR. MALETZ. In other words, you wouldn't know when you start a Sherman Act investigation whether you are going to bring a criminal suit or a civil suit, is that correct?

MR. KENNEDY. That is correct.

MR. MALETZ. You can't determine in advance of the examination of the evidence produced pursuant to subpoena whether a criminal case or a civil case or no case at all should be instituted?

MR. KENNEDY. Frequently that would be correct.

MR. MALETZ. And in the absence of such an advance determination, is there anything in the *Procter & Gamble* decision that prevents the Department from using the grand jury procedure?

MR. KENNEDY. Mr. Maletz, we have to believe that there is a possibility that a criminal prosecution will flow from our investigation. Once we begin our investigation and make a determination that there is not enough evidence that a criminal indictment will arise, then we have to drop that grand jury investigation.

MR. MALETZ. Yes, but I am talking about the commencement of an investigation. When you start an investigation under the Sherman Act, you don't know whether the investigation will lead to criminal or civil prosecution.

MR. KENNEDY. Frequently we do not.

MR. MALETZ. And, therefore, you can resort to the grand jury?

MR. KENNEDY. Yes.

MR. HOLTZMAN. Will you yield at that point?

Assume, Mr. Attorney General, that you commence an investigation, and at that point you are not mindful whether this may or may not result in criminal as well as civil proceeding. Would you under this legislation be permitted to use any evidence that you obtain in the criminal proceeding that might take place as a result?

MR. KENNEDY. Yes. You mean if this bill was enacted?

MR. HOLTZMAN. Yes.

MR. KENNEDY. Yes, we could then use the evidence and information in a criminal case. If we came to the conclusion from evidence

right at the beginning that we had only a civil case, then we would be precluded from using the grand jury.

Mr. ROGERS. Do you think that would comply with the search and seizure provision of the Constitution?

Mr. KENNEDY. Which part, Congressman?

Mr. ROGERS. That part of the bill covering a demand being made by the Chief of the Antitrust Division of the Department of Justice, and then designating a custodian.

Mr. KENNEDY. Yes.

Mr. ROGERS. And you ask the individual to surrender it?

Mr. KENNEDY. Yes.

Mr. ROGERS. To the custodian?

Mr. KENNEDY. Yes.

Mr. ROGERS. Then you take it from the custodian as this bill provides and submit it to the grand jury?

Mr. KENNEDY. Yes.

Mr. ROGERS. Now, no subpoena has been issued. Is that a proper process for getting it?

Mr. KENNEDY. Those who have been subpoenaed are those who are subject to this civil investigative demand and can get to court and take legal action to prevent us from turning it over to a grand jury, for instance. I don't see that there is a problem in this field. I think that they still have the right, ability, and power to go to court and get a court order to prevent us from taking that step.

Mr. ROGERS. Of course they can under a grand jury subpoena, but here, as I understand it, you are not certain whether you have anything to present to the grand jury.

Mr. KENNEDY. Right. When we have this power, we would make an investigation. If we came to the conclusion just from a preliminary study of a complaint that there wasn't a criminal violation, then we would not be able to proceed under the present law. So if this law is enacted, we would proceed under the civil investigative demand. Then we would receive these documents, and if we came across some evidence and information that indicated a violation of criminal law, we would be obligated under our responsibility as the Department of Justice or under our responsibility as a citizen of the United States to bring that to the attention of a grand jury. We would be obligated to do that.

Mr. ROGERS. Would you be obligated to the extent that you would issue a subpoena to the custodian who has been designated?

Mr. KENNEDY. Yes, we could do that. I wouldn't have any objections to that.

Mr. ROBINO. Must there not be, Mr. Attorney General, prior to making the demand for these documents, at least some substantial information, some complaints before the Department?

Mr. KENNEDY. That is correct.

Mr. MALETZ. Mr. Chairman?

Mr. Attorney General, when companies decline to cooperate with the Department of Justice in connection with an investigation of possible Sherman Act violations, the Department can proceed, can it not, to institute a grand jury investigation?

Mr. KENNEDY. Would you repeat that?

Mr. MALETZ. Would you repeat the question, Mr. Reporter?

(The question, as recorded, was read by the reporter.)

Mr. KENNEDY. I think that we would have to believe at that juncture that there was a violation of criminal law.

Mr. MALETZ. You wouldn't know that until you had completed your investigation?

Mr. KENNEDY. Well, you might know that. You might just have enough evidence or information that didn't make it appear that there was a criminal violation; that there probably was only a civil violation.

Mr. MALETZ. Under the Sherman Act?

Mr. KENNEDY. Yes.

Mr. MALETZ. The Sherman Act is both criminal and civil, is it not?

Mr. KENNEDY. I agree, so that if we came to the conclusion based on the information and the evidence that had been made available, that there was only a civil violation, I think we would have a very difficult time calling for a grand jury in all conscience.

Mr. HOLTZMAN. Mr. Chairman?

Mr. RODINO. Mr. Holtzman.

Mr. HOLTZMAN. Mr. Attorney General, actually while you would have an obligation to present these facts uncovered to a grand jury if they warranted it, fundamentally you are interested in this legislation for civil litigation, isn't that so?

Mr. KENNEDY. That is correct.

Mr. HOLTZMAN. That is the very heart of the problem, is it not?

Mr. KENNEDY. If we had the evidence, Congressman, that there was a criminal violation, we have the power at the present time to proceed under those circumstances. It is the case where initially at least, initially, we don't have that kind of evidence or information, and we want to proceed in the civil area.

Mr. MALETZ. I am a little troubled by your reference to a situation where you would know in advance of a Sherman Act investigation that you would file only a civil case. I find it difficult to envisage such a situation in the absence of a complete investigation.

Mr. KENNEDY. Mr. Maletz, we have evidence or information that comes to the attention of the Department of Justice that just doesn't indicate sufficient circumstances or sufficient evidence that might lead to a criminal violation. There are cases such as that.

Mr. MALETZ. Actually under the Sherman Act what you are doing when you bring a civil action is seeking to enjoin the future commission of a crime, isn't that correct?

Mr. KENNEDY. That is correct.

Mr. MALETZ. Now, through a grand jury investigation, the Department can obtain not only documents but sworn testimony of a witness, is that correct?

Mr. KENNEDY. That is correct.

Mr. MALETZ. Whereas through a civil investigative demand, only documents can be obtained, is that correct?

Mr. KENNEDY. That is correct.

Mr. MALETZ. Thus with respect to suspected Sherman Act violations, is not a grand jury investigation a more effective way of obtaining necessary information than a civil investigative demand?

Mr. KENNEDY. If we have enough evidence, as I said, and information to indicate the criminal violation, absolutely. When we have that information and evidence, then we should proceed criminally.

Mr. MALETZ. Do you know of any case involving a possible Sherman Act violation where the Department was ultimately prevented through lack of civil investigative demand authority from obtaining needed documents? I am talking only about a Sherman Act case.

Mr. KENNEDY. I wouldn't have that available right now.

Mr. MALETZ. Could you supply that information for the record?

Mr. KENNEDY. Yes.

(The information referred to appears at p. 57.)

Mr. MALETZ. Now, let me ask you this. Should the Department have authority to issue a civil investigative demand in Sherman Act investigations, would there be a tendency by the Department to place less reliance on grand jury investigations?

Mr. KENNEDY. I think that is a possibility.

Mr. MALETZ. Would this mean in turn a possibility of fewer criminal prosecutions?

Mr. KENNEDY. No, not necessarily.

Mr. MALETZ. Why not?

Mr. KENNEDY. Because once again it is the information and evidence that is available at the beginning, Mr. Maletz. We might proceed in the Department of Justice along the lines where we had information or evidence that didn't indicate a criminal violation, that we would go to the civil investigative demand. After that, the evidence might be produced that we are getting into a criminal violation and then we would obviously be obligated to make that information available to a grand jury.

It wouldn't change, I don't think, the number of criminal violations that might be uncovered by the Department of Justice at all. In fact, it might increase it.

Mr. HOLTZMAN. Mr. Chairman?

Mr. RODINO. Mr. Holtzman.

Mr. HOLTZMAN. As a matter of fact, I was just about to comment that this would undoubtedly increase the number of criminal prosecutions by virtue of the fact that the Department of Justice now would have an additional way of getting information that they may not have at the moment.

Mr. KENNEDY. That is correct.

Mr. MALETZ. To your knowledge before or since the *Procter & Gamble* decision, has the Department ever resorted to the device of using a grand jury investigation for the sole purpose of eliciting evidence for a civil case?

Mr. KENNEDY. I can only talk about since I have been there.

Mr. MALETZ. Yes, of course.

Mr. KENNEDY. Which is since January 1961, and the answer is "No".

Mr. HOLTZMAN. Mr. Chairman, may I ask another question?

Mr. RODINO. Mr. Holtzman.

Mr. HOLTZMAN. Do we now have, Mr. Attorney General, any experience with respect to the cooperation of these corporations since the criminal convictions, early this year, and if we do I'd appreciate it being furnished to this committee.

Mr. KENNEDY. I would just say that from the meetings I have had with the heads of the divisions and with the attorneys of the Anti-trust Division, Congressman, that the situation is getting steadily

worse. We are not receiving cooperation generally from the business community in the United States.

Mr. ROBINO. In other words, Mr. Attorney General, we can conclude that despite the recent cases, that there hasn't been this cooperation on the part of these corporations?

Mr. KENNEDY. In fact the cooperation is lessening, Mr. Chairman.

Mr. MALETZ. Is that true with respect to Sherman Act violations, possible Sherman Act violations as well as Celler-Kefauver?

Mr. KENNEDY. Right across the board.

Mr. MALETZ. Across the board.

Now, before the Senate Antitrust Subcommittee, Judge Loevinger testified that the *Procter & Gamble* decision is now being used to harass the Department in situations where grand jury investigations have led to civil rather than criminal cases, citing as you have the *Carter Products* case, in which the Justice Department officials were subpoenaed to give depositions. Judge Loevinger also testified, as I recall, that similar tactics are being tried in a number of other cases. I wonder whether you would supply for the record a list of the cases in addition to the *Carter Products* case in which such tactics have been used.

Mr. KENNEDY. We will get that information.

(The information referred to appears at p. 57.)

Mr. ROBINO. Incidentally, I would like to recognize that Judge Loevinger is here, seated in the back of the room.

Mr. MALETZ. Would you say that there is a greater need for the civil investigative demand in investigations under the Celler-Kefauver Act than under the Sherman Act itself?

Mr. KENNEDY. I would think so.

Mr. MALETZ. And I take it that is because the Celler-Kefauver anti-merger act is a civil statute?

Mr. KENNEDY. That is correct.

Mr. MALETZ. And you cannot resort to a grand jury process?

Mr. KENNEDY. That is correct.

Mr. MALETZ. A representative of the American Bar Association testified before the Senate Antitrust Subcommittee objecting to the inclusion of section 3 of the Robinson-Patman Act as an antitrust law under this bill on the ground that it has been judicially held not to be one of the antitrust laws, and on the further ground that it is a criminal statute, hence not appropriate for use of a civil investigative demand.

I wonder whether the committee could have the benefit of your comments.

Mr. KENNEDY. Well, I think we feel that it would be helpful to have it, Mr. Maletz, and Mr. Chairman, but that if the committee feels, after a study of the situation, that it would be better to withdraw this, we would not have strong objections to it.

Mr. MALETZ. Is there as much need for civil investigative demand authority under section 3 of the Robinson-Patman Act as under sections 1 and 2 of the Sherman Act in view of the fact that the Attorney General has enforcement jurisdiction under section 3 of the Robinson-Patman Act?

Mr. KENNEDY. Yes, as I say, I think it would give us a broader scope and authority which would be helpful, but I think that the position that the representative of the American Bar Association took



makes some sense. I think that would be in the final determination of the committee as to what position they want to take on it.

We feel that it would be helpful but we recognize the position.

Mr. MALETZ. You don't regard the inclusion of section 3 of the Robinson-Patman Act as essential?

Mr. KENNEDY. No.

Mr. MALETZ. But helpful, is that right?

Mr. KENNEDY. That is correct.

Mr. MALETZ. Now, objections were also made by the American Bar Association to the inclusion of the Federal Trade Commission Act in this bill for the reasons (1) it is not an antitrust act, and (2) that the Attorney General has no power to enforce the Federal Trade Commission Act.

Mr. KENNEDY. Yes.

Mr. MALETZ. I wonder whether we could have your comments.

Mr. KENNEDY. I think my answer that I just gave applies to this, also.

Mr. MALETZ. Isn't there a difference between the situation under the Federal Trade Commission Act, and the Robinson-Patman Act in view of the fact that the Attorney General does have enforcement jurisdiction under Robinson-Patman but not under the Federal Trade Commission Act?

Mr. KENNEDY. Yes, maybe it is stronger, but I still recognize the fact there is an argument toward eliminating that, also.

Mr. MALETZ. I take it you would prefer to retain section 3 of the Robinson-Patman Act as distinguished from retaining the Federal Trade Commission Act, in this bill, is that correct?

Mr. KENNEDY. I would like to have both of them, but I think that is up to the committee.

Mr. MALETZ. The American Bar Association has objected to the substitution of a relevancy test to a pertinency test at page 4, line 9, of the bill.

Do you have any comment on that?

Mr. KENNEDY. Also, we do not have any strong feelings about that.

Mr. MALETZ. I take it—

Mr. KENNEDY. In fact, that wording might be better than our wording.

Mr. MALETZ. I take it the objective of the Department is to be authorized to proceed by civil demand at a time prior to the institution of a civil or criminal action. The bill, as drafted, contains no such limitation.

Do you think that such limitation is desirable?

Mr. KENNEDY. Again, we would have no objection to it. Our intention is what you have just covered.

Mr. MALETZ. The bill in its present form provides for delivery of original documents to a custodian. That is section 4(b), and under section 4(c) the custodian is to take physical possession of the documents.

What is the Department's position on an amendment proposed by the American Bar Association that would require the respondent only to make relevant material available for inspection and copying?

Mr. KENNEDY. Copy would not be sufficient. I think, Mr. Maletz, that we could not accept that.

I would hope that we would not proceed where it would be difficult or cause great hardship for a company, a partnership, to give up the documents, and send them to Washington. I would hope that would not be necessary. I would say at least as long as I am Attorney General—where it was possible—we would just inspect the documents in the place of business. But there will be occasions where we will have to have the documents in our own physical possession.

Copies will not be sufficient.

The original documents in many cases are absolutely necessary and essential.

The authenticity of documents might come into question. You cannot tell from copies of documents whether a document is authentic or not.

So I would say that we would, as a matter of procedure, attempt to use the inspection—use the premises of the company, corporation, or partnership—to examine the documents, but I think that it is essential that where we feel that it is necessary for the documents to be delivered to the Department of Justice, that those documents be delivered and copies would not be a suitable substitute.

Mr. MEADER. Mr. Chairman?

Mr. RODINO. Mr. Meader?

Mr. MEADER. I have a question or two on this very point.

I would like to proceed, if I may, here.

Mr. RODINO. Will you defer until the counsel finishes this point?

Mr. MEADER. Very well.

Mr. MALETZ. I take it that you feel that it is important that you have the right, which you may not always exercise, to obtain original documents?

Mr. KENNEDY. That is correct.

Mr. MALETZ. And one of the reasons, I think you have indicated, is that there may be some question with respect to authenticity?

Mr. KENNEDY. We have had many examples of that.

Mr. MALETZ. I am just wondering about this. Suppose you get a copy of a document in connection with this precomplaint discovery procedure. Subsequently, you issue a complaint. Could you then not invoke the subpoena power of the court to obtain the original of the document so as to obviate any question with to authenticity?

Mr. KENNEDY. I do not know what—you mean we get the document originally under the civil investigation—

Mr. MALETZ. Let us assume that you get a copy of the document under the civil investigative demand.

Mr. KENNEDY. Right.

Mr. MALETZ. Subsequently, you file a complaint, and some question is raised by the defendant that the document is not authentic.

Then could you not have that document subpoenaed?

Mr. KENNEDY. Yes.

Mr. MALETZ. Then I am a little bit troubled about your reference to the question of authenticity.

Mr. KENNEDY. I would like to be able to tell right at the beginning when we first make our investigation that we have the authentic documents. I do not want to be receiving a document which says it is printed in January 1955, and, in fact, it came into existence in January 1960.

Mr. MALETZ. I assume that under the procedure now, where the grand jury issues a subpoena, in many, many cases the Department of Justice will enter into an agreement with the respondent stipulating that copies of documents are perfectly satisfactory in lieu of the originals?

Mr. KENNEDY. Or even in lieu of that, an inspection on the premises.

Mr. MALETZ. Or inspection on the premises. And if the civil investigative demand bill is adopted by the Congress, I assume you would, as Attorney General, follow precisely the same procedure in the great majority of cases, thus if there proven and undue hardship for a respondent to turn over original documents, you would in most instances be entirely agreeable to entering into an informal understanding that the documents could be made available for inspection and copying; is that correct?

Mr. KENNEDY. In fact, I would say even stronger than that—that this is what we would do, unless it was necessary to have the documents in our personal possession.

Mr. MALETZ. I think Judge Loevinger indicated in his testimony before the Senate Antitrust Subcommittee that frequently, since the art is not completely developed, photostating does not reproduce all the items in the original document itself?

Mr. KENNEDY. Again, we have the whole question of the authenticity—

Mr. MALETZ. Yes.

Mr. KENNEDY. Of a document, and it would all depend on what the relationship was and what the situation was that existed at the time.

Mr. RODINO. Mr. Meader?

Mr. MEADER. Mr. Chairman.

Mr. Attorney General, I am concerned very much about this bill because it strikes me as quite an innovation. I would like to draw your attention to the provisions with respect to the Federal Trade Commission's subpoena authority (15 U.S.C.A. 49, sec. 9), of the Federal Trade Commission Act, and I would like to read three paragraphs of that section as a foundation for the question I want to address to you [reads]:

For the purposes of section 41 to 46 and 47 to 58 of this title the commission or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena, issue to any corporation or any person an order requiring such corporation or other person to appear before the commission, or produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Now, I believe that power to compel the production of documents is similar to power vested in other regulatory boards of the Commission.

Mr. KENNEDY. I understand that.

Mr. MEADER. Such as the National Labor Relations Board and perhaps other regulatory commissions.

Mr. KENNEDY. I understand that.

Mr. MEADER. I am not certain whether any department of the Government, as contrasted to a commission, presently possesses similar subpoena authority.

Mr. KENNEDY. That I do not know. I know there are a number of Government agencies that do. Whether any Government department does—

Mr. MEADER. Now, this bill, section 6, on page 12, reads as follows, section 6(a), chapter 73, of title 18 of the United States Code, relating to obstruction of justice is amended by adding at the end thereof the following new section:

Section 1509. Obstruction of antitrust civil process.

Whoever with the intent to avoid, evade, prevent or obstruct compliance, in whole or in part, by any person with any civil investigative demand made under the Antitrust Civil Process Act, willfully removes from any place, conceals, withholds—

I want to emphasize that word, “withholds”—

destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody or control of any person which is the subject of any such demand duly served upon any person shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

Now, the authority to issue a civil demand, coupled with this criminal provision with the words “withholding documentary information” or “documentary material,” strikes me as giving to the Attorney General under this bill more authority than is possessed by any of the independent boards or commissions, since the investigative demand is enforceable by a criminal indictment under section 1509.

My question is this: Is it necessary for the Attorney General, in his investigative activities under the antitrust laws, to have greater power or authority than now exists in the regulatory boards and commissions including the Federal Trade Commission?

Mr. KENNEDY. I would say, Congressman, that the penalty for some of these other organizations where there is a failure to comply is section 1001 of title 18, where the penalty is even greater than here.

Mr. MEADER. Is there a penalty which is operative without proceeding before a court with a subpoena?

Mr. KENNEDY. No. Of course, this would be a penalty, also. They would have to ultimately obviously be indicted and convicted in a court of law for a violation.

Mr. MEADER. I am not familiar with 1001.

Mr. KENNEDY. It is a false statement.

Mr. MEADER. But I am assuming that that could operate only after a commission's subpoena had been disregarded and the commission had applied to a court.

Mr. KENNEDY. No, that would not be it. It is a false statement to a Government agent.

Mr. MEADER. Oh, not for the failure to produce?

Mr. KENNEDY. No—well, it would be a false statement.

Mr. MEADER. A false statement?

Mr. KENNEDY. A false statement, and it goes on false statement, misleading.

Mr. MEADER. Am I wrong in my interpretation of the language I read, section 1590, that the withholding of material subject to a civil investigative demand would subject the withholder to this penalty?

Mr. KENNEDY. Yes, that is correct.

Mr. MEADER. But that would not be true in the case of any existing law relating to the subpoena powers of a commission?

Mr. KENNEDY. I will have to make a study of that particular wording, Congressman, and I would be glad to submit that to you.

As a general proposition, however, the penalty is not any greater than it would be for failure to comply with some of these other agencies.

Mr. MEADER. To get back to my basic question, the Department does not now possess this authority?

Mr. KENNEDY. That is correct.

Mr. MEADER. But feels that it is necessary?

Mr. KENNEDY. That is correct.

Mr. MEADER. To conduct its investigations. What reason is there for making a distinction between procedure now provided for regulatory boards and commissions and the Department of Justice?

Why is not the power that we have given to the commissions for obtaining documents by resorting to the courts sufficient for the Attorney General?

Mr. KENNEDY. For instance, I do not think that they are resorting to the courts there. A subpoena can be issued by a member of the board, signed by a member of the board.

Mr. MEADER. Yes, but if it is disregarded, the only way it can be enforced is for the commission to go before a district court.

Mr. KENNEDY. That is the only way we can do it, also. We have to go before a court, Congressman. We cannot punish the individual.

Ultimately, we have to go to a court to get it enforced and if there is lack of compliance then it has to be presented to a grand jury, and the individual indicted and ultimately convicted. We do not have any authority.

Mr. MEADER. Well, obviously, but it strikes me that the procedure set forth in this bill grants greater authority to the Department of Justice than is granted to these independent boards and commissions in existing law to aid them to get necessary documentary evidence.

Is there some reason why the Department of Justice should have greater power?

Mr. KENNEDY. I did not understand that to be true, Congressman. I have not studied each one of them, but I discussed this matter, and it was generally felt in the Department of Justice that they were quite similar to the power that existed in some of these other Government agencies.

Mr. MEADER. Let me ask this: Do you see anything that would impair your necessary functions if you and the Department of Justice were to be given authority similar to that provided for these regulatory commissions such as I have just read?

Mr. KENNEDY. I would have to read and study each one of those. I think that they differ from one another, in the first place. We feel that this is the best way of handling this situation. It does not go beyond the power and authority that exists now in the Government in the hands of other Government agencies.

Under the circumstances and under the difficult situation we are facing at the present time, and with our responsibility and obligation to enforce the laws, we just do not have the tools and the weapons. We feel this is the best way to attack it.

Now as far as the penalty provision, if the committee determines that there is some other way to handle the penalty provision, we would certainly want to consider that. But we think that this is adequate. We do not think that it is unfair.

Mr. MEADER. You will recall that at the beginning of this section, the right is given to the Commission to examine and copy documentary material.

But that, as I understand it, is not contained in the language of the bill before us, H.R. 6689, although I believe you stated that as a matter of practice you would not physically take possession of the documents which might impair the company's conduct of its business or interfere with its expeditious conduct of its business, but you would leave the documents where they were and make copies to the extent necessary?

Mr. KENNEDY. Yes, unless there was some overriding reason that we would have to take possession.

Mr. MEADER. You think it would be desirable to put phraseology in this bill similar to that of the Federal Trade Commission specifically authorizing access to and making copies of it?

Mr. KENNEDY. I do not think it is necessary, but I would have no objection to it.

Mr. MEADER. That is all.

Mr. KENNEDY. I think it would be understood, in other words, Congressman, that you would do that or could do that.

Mr. RODINO. Counsel?

Mr. MALETZ. Mr. Chairman.

Mr. Attorney General, one or two more questions.

With respect to court proceedings to enforce the civil investigative demand or to modify or set aside such demand, do sections 5(a) and 5(b) of the bill, as drafted, provide potentially different venues?

Let me elaborate. Would it be possible for a proceeding to enforce by the Attorney General be filed in the district associated with the person on whom the demand is made, while a petition to modify or set aside could be filed in a different district, one in which the office of the custodian is situated?

Mr. KENNEDY. I think it should be in any case in the district that is the most convenient for those who are subject to the civil investigative demand.

Mr. MALETZ. Do you see an inconsistency with respect to the venue provisions of 5(b) and 5(c)?

Mr. KENNEDY. Yes. I think we could certainly change them. We would be in favor of changing it to make it in an area that is the most convenient for those who are subject to the civil investigative demand.

Mr. MALETZ. Thank you very much.

I have no further questions.

Mr. RODINO. Mr. Rogers?

Mr. ROGERS. No questions.

Mr. RODINO. Mr. Holtzman?

Mr. HOLTZMAN. I have no questions.

Mr. RODINO. Mr. Toll?

Mr. TOLL. No questions.

Mr. RODINO. Mr. Crabtree?

Mr. CRABTREE. Mr. Attorney General, I have one or two questions.

When Mr. Simon appeared before the Senate committee, he made several suggestions for amendments. Without going into detail and repeating all of the suggestions that he made, has the Department of Justice had an opportunity to study these suggestions and take a position on them?

Mr. KENNEDY. I think that Mr. Loevinger made some comments on some of those when he was asked questions before the Senate committee.

We would be glad, however, to submit a written statement on each one of those.

Mr. CRABTREE. I think it would be very helpful to have that information in the record.

Mr. KENNEDY. We would be glad to supply that.

(The information referred to appears at p. 54.)

Mr. CRABTREE. Now, in the event this bill is enacted and the Congress provides for a civil investigative demand, will it still be necessary for the Congress to pass, in your judgment, the proposed legislation for premerger notification?

And I ask this because the Department of Justice will be able to use the civil investigative demand in merger cases.

Mr. KENNEDY. Yes.

I think still that the other legislation would also be necessary and helpful.

Mr. CRABTREE. Even though there would be some area of overlap?

Mr. KENNEDY. Yes, I recognize the overlapping.

Mr. CRABTREE. Now, Mr. Attorney General, I have several questions with respect to section 4(c) of the proposed bill which will permit the Attorney General to make documents available to the Judiciary Committees of the House and Senate. Are you in favor of having this blanket authority?

Mr. KENNEDY. Yes.

I think that the Judiciary Committee should have this material and information. I think Senator Dirksen has offered an amendment to that in the Senate to which we would have no objection.

Mr. CRABTREE. The reason I asked that question, in the event documents were turned over to the Attorney General, and then were in the possession of the custodian, and later turned over to a legislative committee, there could be a possibility that these documents would contain material which is beyond the jurisdiction of the committee.

Mr. KENNEDY. Yes.

Mr. CRABTREE. Do you think it would be advisable to write any kind of provision into the law requiring either that the documents be pertinent to a valid legislative inquiry or that an investigation be underway at the time by the committee?

Mr. KENNEDY. I would not have any objection to that if the Congress and the Senate feel that this would be fairer. Anything along those lines would be all right with us.

Mr. CRABTREE. There is also this possibility.

This might permit the legislative committees to ride herd on the Attorney General and second-guess him on why he has or has not prosecuted certain cases.

Mr. KENNEDY. We will take our chances.

Mr. CRABTREE. Also, I have in mind this situation which could occur. The respondent, after being served with a subpoena, could question the subpoena in court, and more or less make his peace with the court and then submit the documents as ordered by the court.

But then a legislative committee could ask for these documents. Then what remedy would the respondent have to keep these documents from being turned over to the legislative committee?

Mr. KENNEDY. I think Senator Dirksen has made a recommendation which would give the individual or, rather, the company or corporation some authority to prevent that and have it adjudicated by the court, and we would have no objection to that.

Mr. CRABTREE. You would have no objection?

Mr. KENNEDY. I think that might very well be fairer, but, again, I think whatever Congress says.

Mr. CRABTREE. I have no further questions.

Mr. RODINO. Mr. Attorney General, we thank you for your appearance here this morning, and we appreciate having the benefit of your views.

I know that I speak for the chairman and every member of this committee in commending you for the diligence in which you conduct your office in the protection of the public interest.

Mr. KENNEDY. Thank you, Mr. Chairman.

Mr. RODINO. Thank you very much.

(The information referred to at pp. 45, 46, and 53 follows:)

OFFICE OF THE ATTORNEY GENERAL,  
Washington, D.C., September 11, 1961.

HON. EMANUEL CELLER,  
Chairman, Committee on the Judiciary,  
House of Representatives, Washington, D.C.

DEAR CHAIRMAN CELLER: During my recent appearance before the Antitrust Subcommittee, I promised to comment on certain criticisms of H.R. 6689, which have been advanced by the American Bar Association. Although I discussed some of these criticisms during the course of my testimony, I will cover them again to make sure the Department's position is clear.

Concerning H.R. 6689 the ABA has raised the following issues:

1. Proposed elimination of section 3 of the Robinson-Patman Act from the scope of CID (sec. 2(a)(3), H.R. 6689): We believe that inclusion of the criminal provision of the Robinson-Patman Act in the scope of the CID would be desirable. Evidence of violations of the Robinson-Patman Act is likely to be intermingled with evidence of other antitrust violations. Since the Department is charged with the duty of enforcing section 3 of the Robinson-Patman Act, it should be empowered to seek evidence of violations of that section in any antitrust investigation. However, if the committee believes that this provision should be eliminated, we have no objection.

2. Substitution of "relevant" for "pertinent" (sec. 3(a), H.R. 6689). The word "pertinent" in this section seems proper, but "relevant" is equally appropriate. If the committee prefers the word "relevant," we do not object to such a change.

3. Elimination of the Office of Documents Custodian: The device of a documents custodian was first suggested by the 1955 Attorney General's Committee report. We believe that a documents custodian may be of use, but if the committee desires to eliminate this provision, we will not object.

4. Substitution of a system of inspection and copying of documents (sec. 4, H.R. 6689): In many cases, power to inspect and copy would be sufficient for



our purposes. In other situations, however, it would be very important to us to have the originals of certain documents for the reasons which I gave during my testimony. We urge that provision for obtaining such originals be preserved in H.R. 6689.

5. Description of documents to be produced (sec. 3(b) (1) and (2), H.R. 6689) : The Department feels that no change should be made here. Under H.R. 6689, a CID must describe the nature of the conduct under investigation and describe the "class or classes" of documents "with such definiteness and certainty as to permit such material to be fairly identified." Under the terms of 3(a) of the bill all such material must be "pertinent" (or as an alternative wording, "relevant") to an antitrust investigation. In addition, the requirements of a CID may not be "unreasonable" (sec. 3(c) (1)). At the least then, a civil investigative demand would have to be as specific in its demands as a grand jury subpoena duces tecum. To impose further requirements in this respect would be to ask the impossible in many cases.

6. Additional grounds for quashing a CID (sec. 3(c), H.R. 6689) : We do not agree that this section should be amended to read "unreasonable or improper." The word "improper" does not have a clear meaning with regard to subpoenas duces tecum. If the committee feels that further qualification is desirable here, we suggest "unreasonable or oppressive." This is the language relating to subpoenas duces tecum used in the Federal Rules of Criminal Procedure (F.R.C.P., rule 17(c)).

7. Elimination of criminal sanctions (sec. 6(a), H.R. 6689) : The ABA admits the need for a means of enforcing the CID, but suggests that the present section 1001 of title 18, United States Code, is sufficient. This section relates to false statements made to Government agencies and imposes a larger fine than the penal section of H.R. 6689. However, its application to the CID procedure, and its scope in such investigations, are uncertain at best. The present obstruction of justice statute (18 U.S.C., sec. 1503), is also of doubtful application to the CID. We believe that penal provisions should be clear in their application and scope and give plain warning to those who may be subject to their penalties. Therefore we are convinced that H.R. 6689 should include a specific provision designed to punish obstruction of justice in CID cases. We therefore strongly urge that the penal provision be retained in the bill.

8. Retention of copies (sec. 4(e), H.R. 6689) : The Department feels that it should be allowed to retain copies of documents produced under civil investigative demand. It is generally permissible to retain copies of documents obtained by subpoena (see *Maryland & Virginia Milk Producers Association v. United States*, 250 F. 2d 425 (C.A.D.C. 1957)), and no reason appears for following a different rule in these investigations.

9. Proposed 18-month limit on holding of documents with provision for extension (sec. 4(f), H.R. 6689) : We believe it unwise to set an arbitrary time limit on the period for which documents obtained by CID may be held. Antitrust investigations vary in scope and size. The period of permissible retention of documents in such investigations should be determined by the circumstances of each particular case. The Federal district courts have traditionally been skilled in the matter of adjusting time periods and return dates to reach the result fairest to all parties. Thus we think it most desirable to refer such matters to the experience and discretion of the district courts.

10. Return dates (sec. 3(b) 3, H.R. 6689) : We oppose the ABA proposal that a minimum period of 20 days for compliance with a CID be given in every case for the same reasons stated in the preceding paragraph No. 9.

11. Transfer of documents to antitrust agencies and Judiciary Committees of Congress (sec. 4(c), H.R. 6689) : The ability to transfer relevant documents to other agencies would not be essential to the Department in its functions. It would be a convenience to those agencies in the performance of their duties.

12. Venue provisions (sec. 5(b), H.R. 6689) : The ABA's suggested bill would allow a party served to move to modify or set aside a CID in the judicial district in which it has its principal office or place of business or in such other district as the parties may agree. We do not object to amendment of H.R. 6689 to conform to the ABA proposal in this respect.

13. Time limitations on use of CID : The proposed ABA bill would not permit service of the civil investigative demand after institution of a civil or criminal proceeding in the matter under investigation. We do not object to an amendment conforming H.R. 6689 to the ABA proposal in this respect.

I am also enclosing with this letter a statement giving some examples of harassment of the Government in civil antitrust cases and of Sherman Act investi-

gations closed for lack of adequate discovery power. This information was obtained through questioning antitrust staff attorneys as our files are not set up in such a way as to provide this information without an individual file search. These examples are, therefore, only illustrations of more numerous cases.

As I said in my appearance before the subcommittee, the Justice Department strongly urges the passage of H.R. 6689. If we can be of further assistance to you in this matter, please let us know.

Sincerely,

ROBERT KENNEDY, *Attorney General.*

#### ILLUSTRATIVE EXAMPLES OF CASES SHOWING NEED FOR CIVIL INVESTIGATIVE DEMAND IN ANTITRUST CASES

1. In 1958, we filed a civil complaint, at the conclusion of a grand jury investigation, in a Middle West district court. Thereafter the defendants filed interrogatories that were directed to the Attorney General, the Assistant Attorney General in charge of the Antitrust Division and other attorneys of the Department, to determine whether the grand jury process was abused in connection with the case. A considerable amount of the time of our attorneys assigned to this case was taken up with the preparation of three separate briefs and oral arguments objecting to these interrogatories and in compiling the information that we were finally required to supply. It is quite possible that additional time may be taken up in this phase of the litigation.

2. In 1960, a criminal contempt action for violation of an antitrust judgment was filed in an eastern district court. A previous grand jury investigation in another district involving defendants and others in the industry had not resulted in an indictment. Defendants served interrogatories to obtain information concerning the grand jury investigation and moved for the suppression of all grand jury testimony and documents on the grounds, among others, that the Government had misused the grand jury process by investigating a criminal contempt of a final judgment obtained in another district. Again in this instance, the attention of our attorneys was diverted from a swift resolution of the merits of the case.

3. Recently, a civil antitrust case was filed in a Federal district court after a grand jury had failed to return an indictment in the same matter. Defendants alleged that the Justice Department made its decision not to ask for an indictment before the termination of grand jury proceedings. They filed interrogatories to obtain the names of the Department attorneys and officials who participated in the decision not to ask for an indictment and in the drafting of the complaint. These interrogatories were allowed and subsequently numerous officials and attorneys of the Department were subpoenaed for depositions. A considerable amount of the time of the attorneys assigned to this case has been spent in such proceedings and it is likely that a substantial amount will be required in the future.

4. A few years ago the Antitrust Division began an investigation into an alleged illegal monopoly based upon patent licensing agreements and other practices. None of the practices involved were of the class usually considered to be per se violations. Repeated efforts to obtain necessary information from the potential defendants on a voluntary basis was met with stalling tactics and the eventual production of copies of annual reports to stockholders and other documents of similar value. The continued refusal to supply the requested information forced the Division to close this investigation in 1960.

5. Within the past few years the Antitrust Division began an investigation into the operations of an advisory organization sponsored by local businessmen ostensibly to protect the public. The practices complained of involved price-fixing and boycotting. Our requests for information through the Federal Bureau of Investigation were refused. Since our complainants were of questionable reliability, we did not feel justified in using the grand jury because such use might unfairly discredit the advisory organization in its efforts to protect the public. Since we had no other means of obtaining the necessary information, this investigation was subsequently closed.

6. A few years ago the Division started an investigation into charges that certain producers and suppliers had agreed to divide operational territories and exclude independent suppliers. The chief companies concerned refused to supply the documents requested of them. Since the circumstances surrounding the alleged violations made it unlikely that we would recommend criminal action, the use of the grand jury would have been unjustified. The investigation was recently closed for lack of adequate information.

7. Recently the Antitrust Division began an investigation into an alleged monopoly. Our requests for information were either refused or resulted in the production of only a small portion of the requested information. Since evidence of the conduct alleged to be involved in the matter would probably result only in a civil complaint being filed, use of the grand jury was not considered to be justified. While this investigation has not been closed out, it is at a standstill.

Mr. RODINO. We will now hear from the Honorable James McI. Henderson, General Counsel of the Federal Trade Commission.

Mr. Henderson?

Mr. Henderson, we are glad to welcome you here this morning. Will you identify yourself and the gentleman seated alongside of you?

**STATEMENT OF JAMES McI. HENDERSON, GENERAL COUNSEL,  
FEDERAL TRADE COMMISSION; ACCOMPANIED BY SHERMAN  
HILL, ASSISTANT TO GENERAL COUNSEL, FEDERAL TRADE  
COMMISSION**

Mr. HENDERSON. I have with me Mr. Sherman Hill, who is Assistant to the General Counsel.

Mr. RODINO. I understand you have a prepared statement to read.

Mr. HENDERSON. I do.

Mr. RODINO. Will you go ahead, Mr. Henderson?

Mr. HENDERSON. I appear today at the request of the chairman of this subcommittee to present the Commission's views on H.R. 6689, 87th Congress, 1st session. The proposed legislation would authorize the Attorney General to compel the production of documentary evidence required in civil investigations for the enforcement of antitrust laws, and for other purposes. Under present law, the Department of Justice lacks authority to compel the production of documents during the investigatory stages of civil antitrust proceedings.

The bill, in addition to granting such authority to the Department of Justice, would allow other antitrust agencies, such as the Federal Trade Commission, to examine documentary material taken into custody by the Department of Justice under the provisions of the bill. Under the present working relationship between the Federal Trade Commission and the Department of Justice, representatives of the Commission are frequently permitted to examine documentary material possessed by the Antitrust Division. The bill would confirm and remove any doubt as to the propriety of such examinations.

While the bill would not amend any of the laws administered by the Federal Trade Commission, the Commission, as a result of its experience in enforcing the provisions of the Federal Trade Commission Act, the Clayton Act, and related statutes, recognizes fully the necessity for adequate investigatory powers by antitrust agencies. The Commission is of the opinion that it would be desirable and in the public interest for the Attorney General to be given the authority, provided by this bill, to issue civil investigative demands for the production of documentary evidence before formal proceedings are brought. The grant of such authority would enable the Department of Justice to obtain facts upon which a responsible determination could be made whether such proceedings should be initiated.

Thank you, Mr. Chairman.

Mr. RODINO. Thank you very much.

Any questions?

Mr. MEADER. Mr. Chairman, I should simply like to ask this:

First, how long have you been Counsel?

Mr. HENDERSON. I have been Counsel for the Federal Trade Commission for about 5 months, sir.

Mr. MEADER. And were you connected with the Commission prior to that?

Mr. HENDERSON. I was, since 1958, sir.

Mr. MEADER. The Attorney General presently can request the Commission to obtain information, as I understand it.

Mr. HENDERSON. That is in regard to compliance with decrees and orders perviously issued by the courts in enforcing antitrust laws, yes, sir.

Mr. MEADER. But not to investigate something which has not reached the court stage?

Mr. HENDERSON. They can always make the request, and we would probably honor it, yes, sir, if it appeared to be a violation.

Mr. MEADER. The reason I asked the question, I would like to have your statement about how successful that has been in providing for the Department of Justice the information that it desires, as a matter of practice and of fact.

Mr. HENDERSON. As a matter of practice, we have this informal arrangement where they have access to any documentation that we have. I don't recall very many if any instances where they have made a formal request to investigate a possible violation.

Do you Mr. Hill?

Mr. HILL. There are instances where we have coordinate responsibility to enforce certain sections of the Clayton Act, and in some cases involving section 7 they have turned over case to us which they felt either were more within our area of experience or where they have been met with a refusal to voluntarily furnish information to them.

Mr. MEADER. Maybe my impression is not correct and, if so, I would like to have it corrected, but I understood that there was presently in the law a provision whereby the Justice Department could request the Federal Trade Commission to obtain information for investigative purposes of the Department of Justice. Am I correct in that?

Mr. HILL. There is that provision that Mr. Henderson mentioned that gives the Attorney General the right to request us to conduct an investigation as to the manner and form of compliance with anti-trust decrees.

Mr. MEADER. But that excludes then, any investigation where there is no court case pending or court proceeding of any kind pending?

Mr. HILL. That is right.

I am not aware of any instances where we have, apart from the type mentioned, conducted investigations on their behalf.

Mr. MEADER. I am now confused. Somewhere I have the impression that the Department of Justice can presently request the Federal Trade Commission to obtain information for it prior to any pending court proceeding.

Mr. HENDERSON. Mr. Congressman, I don't recall that there is that formal provision, that it is a statutory provision, let me put it that way.

Mr. MALETZ. Mr. Chairman?

Mr. RODINO. Mr. Counsel, let's check that section.

Mr. MALETZ. There is such a provision. I will locate it in just a moment.

I think it is section 6 of the Federal Trade Commission Act.

Mr. RODINO. Are there any other questions while he is trying to locate that, Mr. Meader?

Mr. MEADER. That was my primary question.

Mr. RODINO. Perhaps some of the other members have some questions.

Mr. MALETZ. Mr. Chairman, the provision is section 6(e) which in relevant part provides as follows:

that the Commission shall also have power, upon the application of the Attorney General, to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

It is correct, Mr. Henderson, isn't it, that the Federal Trade Commission does have subpoena power?

Mr. HENDERSON. That is correct, yes, sir.

Mr. MALETZ. Judge Loevinger testified before the Senate Antitrust Subcommittee on this very point, and indicated, did he not, that resort to the Federal Trade Commission would be a most cumbersome procedure and administratively unworkable? Do you recall that testimony?

Mr. HENDERSON. That is correct. He did so testify.

Mr. MALETZ. He testified similarly before this subcommittee within the past 2 months, I am quite sure.

But in answer to Mr. Meader's question, isn't it correct that the Attorney General can call upon the Federal Trade Commission to conduct investigations to determine whether business corporations are violating the antitrust acts?

Mr. HENDERSON. Yes, they can do that under this section which you have just read, 6(e). That actually has been, that section has been used very little. We don't know where we would go after we had made the determination, whether or not the Federal Trade Commission would then act on its own behalf or give the information to the Attorney General.

Mr. MALETZ. As a matter of fact, didn't the Attorney General call upon the Federal Trade Commission to investigate over 50 consent decrees entered by the Department of Justice to determine the manner in which the defendants had been complying with the decrees?

Mr. HENDERSON. Yes, they did that in April of this year.

Mr. MALETZ. And I take it that that investigation by the Federal Trade Commission is still underway?

Mr. HENDERSON. That is correct.

Mr. MALETZ. I also understand that the Federal Trade Commission has asked for an increased appropriation from the Congress for the purpose of conducting that investigation, is that right?

Mr. HENDERSON. That is correct.

Mr. MALETZ. How much more?

Mr. HENDERSON. \$1,250,000.

Mr. RODINO. It contemplates a lot of investigations.

Mr. Meader?

Mr. MEADER. Mr. Henderson, I am asking the Counsel to find the passage where Judge Loevinger testified that resorting to Federal

Trade Commission subpoena power would be cumbersome. Apparently this rule for obtaining information for the Department of Justice has not been employed very extensively, am I correct about that.

Mr. HENDERSON. That is correct.

Mr. MEADER. If that is so, how would we be able to tell whether it is cumbersome or not?

Mr. HENDERSON. Just by the very virtue of us having to make determinations of what to investigate and then suppose we turn that material over to the Department of Justice, it may very well be that they would have another theory of the case which would necessitate coming back to us and saying will you investigate further along this theory?

It means having two agencies involved in a single case, and to that extent I think it would be quite cumbersome. I think it would be much simpler to have one agency charged with the responsibility and to have the authority to make the investigation rather than to have to come to us and then us refer the material back to them.

Mr. MEADER. On the other hand, in many instances the Federal Trade Commission and the Department of Justice have parallel authority?

Mr. HENDERSON. That is correct.

Mr. MEADER. And they might both be going after the same corporation and the same evidence. It might get into kind of a conflict.

Mr. HENDERSON. That is quite possible, but in order to avoid that conflict we have a liaison with the Department of Justice, and we interchange, exchange information with them constantly as to what our investigations are, and they give us the same information as to what investigations they are conducting, so as to avoid this duplication of effort.

Mr. MEADER. If that liaison is effective and efficient, it strikes me that there shouldn't necessarily be any great difficulty and cumbersome procedure in the Department of Justice requesting the Federal Trade Commission to obtain the information for it.

Mr. HENDERSON. As a practical matter, Mr. Congressman, it seems to me that this would simply cause—for example, we have just streamlined our operations to some extent to avoid that very thing, of having to have one group make an investigation and another group then take the case over and make the case, build the case up. In order to avoid that very thing, we now put a man in charge and he directs the investigation and builds his case as he goes along, so that there is no necessity for an overlapping of authorities and of this interchange of information. It is one thing, I think, to have a liaison with the Department of Justice where we simply say we are investigating X company for violation of the Clayton Act, and another one to have to tell them in detail and educate their attorneys in detail as to what the violation is from the evidence that we have collected.

Mr. MEADER. That is all.

Mr. RODINO. Mr. Counsel?

Mr. MALETZ. So that the record will be clear, Judge Loevinger testified before this subcommittee on June 14, and was asked specifically whether the Department of Justice could call upon the Federal Trade Commission to conduct investigations of possible antitrust violations. He was asked whether the Federal Trade Commission

power of subpoena would not be sufficient in lieu of civil investigative demand authority. He testified—and I now have the hearings—that resort to the Federal Trade Commission by the Department of Justice would be administratively unworkable.

The testimony is as follows, Mr. Chairman. This is at page 9 of the hearings on "Antitrust Consent Decrees and the Television Broadcasting Industry," testimony of Judge Loevinger, at pages 9 and 10.

Judge Loevinger was asked about section 6(e) of the Federal Trade Commission Act; he was asked this question:

Mr. MALETZ. As you pointed out, the Justice Department is presently faced with the difficulty of not having precomplaint subpoena power; is that right?

Mr. LOEVINGER. Yes, sir.

Mr. MALETZ. And I understand from what you have testified that this lack of legal authority has materially hampered antitrust investigations by the Antitrust Division; is that right?

Mr. LOEVINGER. Yes, sir.

Mr. MALETZ. Section 6(e) of the Federal Trade Commission Act reads as follows and I quote:

"Upon the application of the Attorney General to investigate"—this is one of the duties of the Federal Trade Commission—"Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law."

Now, pending congressional consideration of the Attorney General's request for legislative authorization to issue a civil investigative demand in antitrust investigations, could the Attorney General have the Federal Trade Commission, under section 6(e) of the Federal Trade Commission Act, assist in conducting antitrust investigations?

Mr. LOEVINGER. We have considered this possibility, and I am not prepared to say that it is not legally possible. It appears to be administratively unworkable.

Mr. RODINO. Is that clear, Mr. Meader?

Mr. MEADER. It is clear that Judge Loevinger said that it was administratively unworkable, but it is not very clear just why, and that is what I was trying to get from Mr. Henderson. I don't like to rest a case upon a generality or conclusion unless it is possible to get some kind of support for it.

Mr. RODINO. May we conclude that we have the opinion of an expert in the Department on this?

Yes; Mr. Counsel?

Mr. MALETZ. I have no further questions, Mr. Chairman.

Mr. RODINO. Thank you very much—unless you have something further to add, Mr. Henderson.

Mr. HENDERSON. Just to add to this statement: That I spent some 8 years as a special assistant to the Attorney General in the Antitrust Division, and my recollection is we never did call—we have never called on the Federal Trade Commission for this type of investigation, Mr. Congressman, simply because we thought that it would not work out feasibly and without a great deal of duplication of effort.

Mr. RODINO. Do you agree with Mr. Loevinger's statement?

Mr. HENDERSON. Yes; I agree with the judge.

Mr. RODINO. That it might be administratively unworkable.

Mr. CRABTREE. May I ask a question, Mr. Chairman?

As a matter of fact, the procedure by which the Department of Justice and Federal Trade work is this: The first agency which decides it



is going to prosecute or investigate a case, then through its liaison channels informs the other agency, and then it has that case for all exclusive purposes?

Mr. HENDERSON. Not necessarily; no. Once we have established and have agreed on who is going to have the jurisdiction, the details of communication—there are no detailed communications as to the progress of the case, unless we find that perhaps we should turn it over to Justice or as they have in the past found that they should turn a case over to us after they have started investigation.

Mr. CRABTREE. In that respect, it would be possible for the Department of Justice to turn an entire case over to the Federal Trade Commission?

Mr. HENDERSON. Yes.

Mr. CRABTREE. For investigation and prosecution?

Mr. HENDERSON. Yes; correct.

Mr. RODINO. Thank you very much, Mr. Henderson.

(Mr. Henderson's prepared statement follows:)

STATEMENT OF JAMES MCI. HENDERSON, GENERAL COUNSEL,  
FEDERAL TRADE COMMISSION

I appear today at the request of the chairman of this subcommittee to present the Commission's views on H.R. 6689, 87th Congress, 1st session. The proposed legislation would authorize the Attorney General to compel the production of documentary evidence required in civil investigations for the enforcement of antitrust laws, and for other purposes. Under present law, the Department of Justice lacks authority to compel the production of documents during the investigatory stages of civil antitrust proceedings.

The bill, in addition to granting such authority to the Department of Justice, would allow other antitrust agencies, such as the Federal Trade Commission, to examine documentary material taken into custody by the Department of Justice under the provisions of the bill. Under the present working relationship between the Federal Trade Commission and the Department of Justice, representatives of the Commission are permitted to examine documentary material possessed by the Antitrust Division. The bill would confirm and remove any doubt as to the propriety of such examinations.

While the bill would not amend any of the laws administered by the Federal Trade Commission, the Commission, as a result of its experience in enforcing the provisions of the Federal Trade Commission Act, the Clayton Act, and related statutes, recognizes fully the necessity for adequate investigatory powers by antitrust agencies. The Commission is of the opinion that it would be desirable and in the public interest for the Attorney General to be given the authority, provided by this bill, to issue civil investigative demands for the production of documentary evidence before formal proceedings are brought. The grant of such authority would enable the Department of Justice to obtain facts upon which a responsible determination could be made whether such proceeding should be initiated.

Mr. RODINO. We will now hear from Mr. William Simon, Esq., on behalf of the American Bar Association.

Mr. Simon, will you identify yourself fully? We welcome you here this morning and appreciate your taking the time to give us the benefit of your views and the views of the American Bar Association.



**STATEMENT OF WILLIAM SIMON, ESQ., HOWREY, SIMON, BAKER & MURCHISON, ON BEHALF OF THE AMERICAN BAR ASSOCIATION**

Mr. SIMON. My name is William Simon. I am a member of the District of Columbia bar and a partner in the law firm of Howrey, Simon, Baker & Murchison.

I appear here this morning in response to a request of the chairman of this committee to express the views of the American Bar Association on H.R. 6689.

Mr. RODINO. I notice you have a prepared statement.

Mr. SIMON. I would like to suggest, if I may, Mr. Chairman, that the prepared statement, together with the draft bill which is referred to in the prepared statement, be submitted for the record, and I think it might be more efficient and more expeditious if I then pointed out to you without reference to the statement the highlights of the American Bar Association's suggestion.

Mr. RODINO. I think that would be most desirable. Thank you very much.

Mr. SIMON. I will, then, hand the reporter the statement and the proposed bill of the American Bar Association.

Mr. RODINO. It will be admitted into the record.

(The statement referred to is as follows:)

**STATEMENT OF THE SECTION OF ANTITRUST LAW OF THE AMERICAN BAR ASSOCIATION  
ON CIVIL INVESTIGATIVE DEMAND LEGISLATION**

The House of Delegates of the American Bar Association has authorized the officers and council of the section of antitrust law to recommend to the Congress that legislation be enacted which would authorize the Attorney General or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, under appropriate safeguards, to demand the production at the principal office or place of business of corporations, partnerships, or associations under investigation, for purposes of inspection and copying, of relevant unprivileged documents possessed by them, and to vest the U.S. district court for the district in which such principal office or place of business is located, with power to enforce, modify, or set aside such demand.

S. 167, 87th Congress, 1st session, was introduced by Senator Kefauver on January 5, 1961, and was referred to the Committee on the Judiciary. S. 167 is with two minor exceptions identical to S. 716 which passed the Senate on July 29, 1959, but was not acted upon by the House of Representatives. We strongly oppose S. 167 for the reasons which will be stated hereinafter, and we urge its disapproval. We attach hereto a draft of a bill containing all of the recommendations approved by the House of Delegates of the American Bar Association which are believed to be desirable in legislation granting the Department of Justice the power to demand the production of documents in civil antitrust enforcement. Incomplete investigation may result either in the commission of this statement.

**THE NEED FOR SUCH LEGISLATION**

We believe that adequate investigatory processes are essential to effective antitrust enforcement. Incomplete investigation may result either in the commencement of proceedings which complete investigation would demonstrate to be unwarranted or in the failure to commence proceedings which more thorough investigation would show to be clearly in the public interest.

Where criminal proceedings are contemplated, adequate power exists to compel, through the use of a grand jury subpoena, the production of all documents and testimony necessary to determine whether an indictment should be returned. Similarly, after an indictment has been returned or a civil complaint filed, the Department of Justice has available adequate compulsory process to obtain all documentary and testimonial evidence essential for the trial of the case.

In conducting civil antitrust investigations, however, the Department must either depend upon voluntary cooperation by those under investigation or file a skeleton complaint in order to avail themselves of the discovery processes afforded by the Federal Rules of Civil Procedure. The Judicial Conference of the United States has said that no plaintiff should "pretend to bring charges in order to determine whether actual charges should be brought." Notwithstanding the fact that in many, if not most cases, voluntary cooperation has been sufficient, it is manifest that antitrust enforcement cannot be left dependent upon the voluntary cooperation of those under investigation. This is especially true now that the Supreme Court has held that the Department was mistaken in its view that the grand jury could be used as a general investigative body in situations in which criminal proceedings were considered to be inappropriate and inadequate to obtain the relief believed to be desirable. (See *U.S. v. Procter and Gamble*, 356 U.S. 677 (1957).)

#### COMMENT ON S. 167

The Antitrust Section of the American Bar Association is in agreement with the basic objective of S. 167, which is to empower the Attorney General and the Assistant Attorney General in charge of the Antitrust Division to issue and have served a civil investigative demand. In many respects, however, S. 167 fails to conform to the recommendations of this section. A comparison of the draft bill, which is attached hereto and made a part hereof, with S. 167 will disclose the differences which we think are significant and which we think should be incorporated into S. 167. Some of these points will be discussed herein.

We believe it is desirable to vest the power to issue and to seek judicial enforcement of a civil investigative demand in the Attorney General and in the Assistant Attorney General in charge of the Antitrust Division. However, since this would lodge in the executive department considerable power in the nature of a subpoena, it is also desirable that this power be exercised with restraint, and that its exercise be surrounded with adequate safeguards against abuse.

At the outset, we would like to register a strong objection to including within the definition of "antitrust laws," section 3 of the Robinson-Patman Act (15 U.S.C. 13a). In *Nashville Milk Co. v. Carnation Co.* (355 U.S. 373 (1958)),

U.S. Supreme Court held that section 3 is not one of the "antitrust laws." Despite the fact that S. 167 indicates that the inclusion of section 3 in the definition of "antitrust laws" is limited to "as used in this bill," there is danger that it might erroneously be construed as intending to overrule the *Nashville Milk* case. Since the purpose of S. 167 relates solely to civil suits, the inclusion in it of the solely criminal provision of section 3 of the Robinson-Patman Act is highly irregular. There has been considerable controversy with respect to this section and any proposal which might conceivably be construed to make section 3 of the Robinson-Patman Act a part of the "antitrust laws" for purposes of private suit should be subject to public hearings called for that specific purpose. The inclusion of this provision in this bill is unwarranted and is completely unrelated to the purpose of the bill.

We believe that the civil investigative demand should be authorized to require the production only of those documents which are "relevant" to the subject matter of the investigation. The language used in S. 167 authorizing a request for documents which are "pertinent" to the investigation has no accepted meaning, whereas under the Federal Rules of Civil Procedure, the courts have had many opportunities to interpret what is "relevant" to a particular subject matter. The draft of the bill attached hereto provides for application of these rules when not inconsistent with other provisions of the bill. This would make these decision available for guidance. We believe moreover, that the demand should only be used prior to the institution of a civil or criminal proceeding and should not be available as a substitute for discovery proceedings following the institution of such action. S. 167 does not provide for either of these safeguards.

S. 167 would require original records to be produced and surrendered, in all likelihood for removal to a point some distance from the principal offices of the concern being investigated. We believe such a procedure is not appropriate for civil investigations. The Section of Antitrust Law of the American Bar Association proposes that there be substituted for this production and delivery concept, the procedure of making relevant material available for inspection and copying. This is similar to the postcomplaint discovery procedures provided by the Federal Rules of Civil Procedure and similar also to the access to records provision incorporated in antitrust consent decrees for enforcement purposes, and will we believe serve the purposes of the Antitrust Division without working an undue hardship on the investigatee. It has the additional beneficial effect of encouraging antitrust investigators to take a selective, rather than a wholesale approach in drafting the demand.

Section 3(b)(1) should, in our opinion, provide that the demand state the subject matter of the investigation in some detail. In addition to setting forth the statutes and the section or sections thereof under which the investigation is proceeding, the subject matter of the investigation should be set forth as a description of the particular offense involved. The language set forth in the proposed bill attached hereto, in section 3(b)(1), will adequately provide the desirable safeguards and, at the same time, would not be restrictive on the Antitrust Division. It is important that the language used in this section, when related to that part of section 1 which authorizes the issuance of the demand, create specific standards by which a court can measure the scope of the demand and also from which a company receiving such a demand can determine the return it should make thereto. The company must make some selection of the records it will make available for inspection by the Antitrust Division. It is not possible to do this intelligently unless the demand discloses the nature of the antitrust violation being investigated. A court would need this same information to know whether the demand contained any "unreasonable" or "improper" requirements, or whether it encroached upon any recognized "privilege." We feel, therefore, that careful attention should be given to the language used in section 3(b)(1).

A similar problem is created by 3(b)(2). We believe there is some problem in using the words "class or classes" of documents to be made available and we would prefer that the requirements of this section be directed to the description of the documents themselves with reasonable specificity rather than of the type of document.

We believe the language used in section 3(c) should be broad enough to recognize the rights of investigatees as they exist today in behalf of the corporation which is served with a subpoena duces tecum. In section 3(c)(1), it is important to have inserted in S. 167, the words "or improper" after the word "unreasonable" in line 5 of page 5. In section 3(c)(2) of S. 167 we think the privilege question is broader than is there provided and should be revised to add the words "or which for any other reason would not be required to be disclosed" after the word "disclosure" in line 10 of page 5. The courts have recognized a distinction between "improper" and "unreasonable" requirements in subpoenas and we think that this should be preserved as to the demand. Moreover, the courts have recognized that "privileged" documents are not the only ones that should be free from disclosure. For example, it is desirable to incorporate the protection that is accorded to the "work product" of the parties.

In our proposed draft, service of the demand is separated from service of the petition. Section 5 provides for court jurisdiction and power with respect to petitions.

We think it is desirable to have as part of section 3 a provision which would place the burden upon the investigatee of either complying with the demand or going to court to seek relief from its terms. Such a provision does not appear in S. 167 but is provided in our draft in section 3(f). We believe that in the usual case no other sanctions will be necessary. This is the type of procedure that is applicable to a subpoena duces tecum and we believe the practice there has been found to be workable. When there is failure to comply with the demand, the Attorney General can go into court and get an order enforcing the demand which, if disobeyed, may be punished under contempt procedures. We believe also that the existing statutory provisions (18 U.S.C. 1001), for punishment of concealment of material facts or the obstruction of justice are sufficient penalties, should there be any willful violation of the demand. For this reason we believe there is no need for the "criminal penalty" section appearing in S. 167.

By utilizing the procedure of inspection and copying at the principal place of business of the company being served with the demand, rather than the production and delivery technique provided for by S. 167, the Department of Justice will have in its possession copies of documents which it has made during the examinations of the material assembled in response to the demand. Consequently, there would be no need for the cumbersome custodian procedure provided for in S. 167. In any event, the custodian provided for in S. 167 would be an employee of the Department of Justice and, therefore, subject to the direction and control of the Attorney General. Any independence of action on the part of such a custodian would be largely illusory and it is more realistic to make the Attorney General directly responsible for such documents or material. The office of the Attorney General perpetuates, and charging it with such responsibility avoids questions which may arise if a custodian has left the employ of the Department or is otherwise unavailable when judicial enforcement of his duties is sought. Our section 4(a) will accomplish this.

The antitrust section of the American Bar Association disapproves of provisions in S. 167 which apparently would authorize perpetual retention of copies of documents produced under demand. It would not only encourage, but would require, the accumulation of a library of copies, lending natural impetus to the commencement of cases based on ancient history. Such a practice would be contrary to the holding of the Supreme Court in *U.S. v. Wallace and Tiernan Co.* (336 U.S. 793, 801 (1948)).

S. 167 provides no real basis for ascertaining when documents must be returned to the company from whom they have been obtained. Section 4(f) of S. 167 provides that any person who has produced material under the act may demand the return of his documents if no case or proceeding has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation." No individual company knows the extent of an investigation or the number of companies subpoenaed in an investigation and, therefore, would not be in any position to know when a reasonable time has elapsed "after completion of examination and analysis of all evidence assembled" in the course of such investigation. Moreover, an investigatee, when served with such a demand, is placed under other burdens than mere production of documents for inspection and copying. The investigatee must retain all related documents to those submitted to the Department so as to be in a position to meet or explain any charges which may be brought at some subsequent time. Consequently, the absence of some means of determining when documents should be returned places heavy burdens upon an investigatee. As there should be an end to litigation, so should there be an end to investigation.

We strongly recommended a requirement that all copies of documents be returned to the company from which they were obtained and that a reasonable period be set in the bill, at the end of which such documents must be returned unless by order of court, upon a showing of good cause, that period has been extended. In our draft of the bill, this period is 18 months, which coincides with the maximum period of duration of a grand jury.

The section of antitrust law believes further that copies of documents obtained as a result of the demand should not be disclosed to anyone other than authorized employees of the Department of Justice and this restriction on disclosure should extend to the contents of the documents as well as to their physical examination. In view of the fact that the Congress and the Federal Trade Commission and all other agencies charged by law with the administration or enforcement of any antitrust law already possess plenary investigative powers, access to documents produced under a demand is not necessary. Moreover, the provisions making such documents available to Congress and to other agencies are subject to abuse, through loose handling and unauthorized disclosure of documentary material so produced. It is our belief that business concerns are at least entitled to know which arm of the Government is investigating them and perhaps contemplating commencement of proceedings. This is not only desirable from a sense of fair play, but it may well be beneficial both to the investigating group and the company. Since the scope of an investigation being conducted by the Congress or by an agency of the Government is not likely to be coincident with that of any other investigating body, other documents in the possession of an investigated company may well be relevant to a subsequent investigation, though they were not to the earlier one. These

other documents may place an entirely different light on the documents in the possession of the Government agency conducting the earlier investigation. This may be beneficial to the company and/or this may effect the decisions of the subsequently interested agency.

In our proposed bill we have drafted section 5 in an effort to clarify the jurisdiction and venue provisions and the use of the petition to enforce or modify the demand. We believe the provisions in our bill are a considerable improvement over the language used in S. 167 and that under the revision, the Department and the investigatee are treated equally and have equal rights and privileges to bring an action to preserve or advance their rights. S. 167 provides for a maximum of 20 days in which an investigatee may file a petition attacking the demand. This time is shortened if the return date is less than 20 days. We believe that like the procedure under a subpoena duces tecum, investigatees should be able to attack the demand at any time before the return date and that each demand should provide a reasonable period for the investigatee to assemble his documents for inspection. As with subpoenas, this could rarely be less than 20 days and for this reason we believe a maximum of 20 days is too restrictive.

As we have indicated above, we do not believe that section 6 headed "Criminal Penalty" is either desirable or necessary. We believe that establishing criminal penalties for persons who "with intent to \* \* \* obstruct compliance \* \* \* willfully \* \* \* withhold \* \* \* documentary material" is an unnecessary and unduly harsh provision and we urge that it be deleted. While the intent requirement of the section is some protection to investigatees, the possibility it raises of criminal prosecution for perhaps wrongly appraising a document as privileged or nonresponsive, carrying out established procedures for the retirement of old records, etc., is an unfair burden upon businessmen and their counsel.

#### CONCLUSION

As we have pointed out at the outset and as we hope is evident from the comments and recommendations we have made throughout this statement, the Antitrust Section of the American Bar Association believes that legislation of this type is desirable, and that the Antitrust Division could well use the civil investigative demand procedure to round out its investigative powers. We do believe, however, that S. 167 does not provide the Antitrust Division with the proper tool nor does it provide adequate safeguards for the investigated company. We believe that the draft of a proposed bill which we attach hereto and make a part hereof, does these things and we urgently recommend that S. 167 not be adopted and that in lieu thereof, a bill providing substantially as is provided in our draft bill be adopted.

A BILL To authorize the Attorney General to compel the production of documentary material required in civil investigations for the enforcement of the antitrust laws, and for other purposes

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:*

SECTION 1. This Act may be cited as the "Antitrust Civil Process Act of 1956."

#### DEFINITIONS

SEC. 2. As used in this Act—

(a) The term "antitrust laws" as used herein, is defined in section 1 of "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730, as amended; 15 U.S.C. 12), commonly known as the Clayton Act.

(b) The term "antitrust investigator" means any attorney employed by the Department of Justice who is charged with the duty of enforcing any antitrust law.

(c) The term "person", unless otherwise specified herein, means any corporation, association, partnership, or other legal entity, not including a natural person.

(d) The term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document in the possession, custody, or control of any person.

## CIVIL INVESTIGATIVE DEMAND

SEC. 3. (a) Whenever the Attorney General or the Assistant Attorney General in charge of the Antitrust Division has reason to believe that any person under investigation may be in possession, custody, or control of any documentary material relevant to the subject matter of an antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, execute and issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to make available such documentary material for inspection and copying.

(b) Each such demand shall—

(1) state the subject matter of the investigation, including the particular offense which the Attorney General or the Assistant Attorney General in charge of the Antitrust Division has reason to believe may have been committed, and the statute and section or sections thereof, alleged violations of which is under investigation;

(2) describe the documentary material to be made available thereunder with reasonable specificity so as fairly to identify the material demanded;

(3) prescribe a return date which will provide a reasonable period of time within which the documentary material so demanded may be assembled and made available; and

(4) identify the antitrust investigator to whom such documentary material is to be made available for inspection and copying.

(c) No such demand shall—

(1) contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged violation; or

(2) require the making available of any documentary material which would be privileged from disclosure, or which for any other reason would not be required to be disclosed, if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged violation.

(d) Any such demand may be served by an antitrust investigator or any United States marshal or deputy marshal at any place within the territorial jurisdiction of any court of the United States.

(e) Service of any such demand may be made by—

(1) delivering a duly executed copy thereof to any executive officer of a corporation, association, or other legal entity to be served or to any member of a partnership to be served;

(2) delivering a duly executed copy thereof to the principal office or place of business of the partnership, corporation, association or other legal entity to be served; or

(3) mailing by registered or certified mail a copy thereof addressed to such partnership, corporation, association, or other legal entity at its principal office or place of business.

A verified return by the individual serving such demand setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) A person upon whom a demand is served pursuant to the provisions of this section shall comply with the terms thereof unless otherwise provided by order of court issued under section 5 hereof.

(g) Documentary material demanded pursuant to the provisions of this section shall be made available for inspection and copying during normal business hours at the principal office or place of business of the person served, or at such other times and places as may be agreed upon by the person served and the antitrust investigator identified in the demand.

## PRESERVATION AND RETURN OF DOCUMENTS

SEC. 4. (a) The Attorney General shall be responsible for the custody, use, and necessary preservation of any copies of the documentary material made available pursuant to a demand, and for the return thereof as provided by this Act.

(b) No copies of material made available pursuant to a demand shall, unless otherwise ordered by a district court for good cause shown, be available for examination or copying by, nor shall the contents thereof be disclosed to, any

individual other than an authorized employee of the Department of Justice, without the consent of the person who produced such material; *Provided*, That, under such reasonable terms and conditions as the Attorney General shall prescribe, the copies of such documentary material shall be available for examination and copying by the persons who produced such material or any duly authorized representative of such person. Any authorized employee of the Department of Justice may be furnished with such copies of such documentary material as are necessary to the conduct of the investigation for which such material was produced and of any case or proceeding before any court or grand jury involving any alleged antitrust violation.

(c) When copies of any documentary material made available pursuant to a demand are no longer required for use in connection with the investigation for which they were demanded or in a pending proceeding resulting therefrom, or at the end of eighteen months following the date when such material was made available, whichever is the sooner, all copies of such material shall be returned to the person who produced it, and such person shall be relieved of the duty to hold such documentary material available for inspection and copying as required by section 3(a): *Provided, however*, That this shall not require the return of such copies of documentary material which have passed into the control of any court: *And provided further*, That any district court in which a petition may be filed as set forth in section 5 hereof may, upon good cause shown, extend said period of eighteen months.

#### JUDICIAL PROCEEDINGS

##### JURISDICTION OF DISTRICT COURT

Sec. 5. (a) The United States district courts are vested with jurisdiction to hear and determine any petition filed under this Act and to issue upon good cause shown any order which justice may require, including without limiting the generality of the foregoing, the following:

(1) an order enforcing compliance with a demand issued hereunder;

(2) an order modifying or setting aside any such demand;

(3) an order requiring the Attorney General or the Assistant Attorney General in charge of the Antitrust Division to perform any duty imposed upon either or both of them by the provisions of this Act;

(4) an order extending the time within which any act must be done, which is allowed or required to be done by this Act, pursuant to a demand issued hereunder, or by previous court orders.

(b) A petition to enforce compliance with any demand served upon any person under section 3 may be filed by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division in any United States district court in which such person has its principal office or place of business, or in such other district as the parties may agree.

(c) A petition to modify or set aside a demand issued pursuant to section 3 or to require the Attorney General to perform any duty imposed by the provisions of this Act may be filed by the person upon whom such demand was served in any United States district court in which it has its principal office or place of business, or in such other district as the parties may agree.

(d) All other petitions in connection with a demand may be filed in any United States district court in which the person upon whom such demand was served has its principal office or place of business, or in such other district as the parties may agree.

#### APPEALS

(e) Any final order entered upon a petition under this Act shall be subject to appeal pursuant to section 1291 of title 28 of the United States Code. Compliance with a demand may be stayed pending appeal, in whole or in part, only by order of court upon good cause shown.

##### STAY OF PERFORMANCE PENDING COURT PROCEEDINGS

(f) The time allowed for the production of documentary material or the performance of any other act required by this Act shall not run during the pendency in a United States district court of a petition under this Act.



## RULES APPLICABLE

(g) To the extent that such rules may have application and are not inconsistent with this Act, the Federal Rules of Civil Procedure shall apply to any petitions under this Act.

## SAVING PROVISION

SEC. 6. Nothing contained in this Act shall impair the authority of the Attorney General or any antitrust investigator to (a) lay before any grand jury impaneled before any district court of the United States any evidence concerning any alleged antitrust violation, (b) to invoke the power of any such court to compel the production of any evidence before any such grand jury, (c) file a civil complaint or criminal information alleging an antitrust violation which is not described in section 3 (b) (1) hereof, or (d) institute any proceeding for the enforcement of any order or process issued in execution of such power, or for the punishment of any person, including a natural person, for disobedience of any such order or process by any person.

Mr. SIMON. May I say preliminarily, Mr. Chairman, that I am chairman of the Committee on Practices and Procedure of the Antitrust Section of the American Bar Association and I am a former chairman of the antitrust section itself. I was also a member of the Attorney General's National Committee to Study Antitrust Laws, which as has been indicated here this morning was the first entity to recommend legislation such as you have before you today for a civil investigative demand.

Mr. RODINO. You served on that committee?

Mr. SIMON. Yes, sir.

The American Bar Association does recommend the enactment of legislation authorizing the Attorney General to demand the production of documents in a civil investigation of the antitrust laws from persons under investigation in connection with an alleged violation, but subject to appropriate safeguards.

And the American Bar Association does not believe that H.R. 6689 contains appropriate safeguards, and, therefore, recommends that the bill as introduced not be reported or enacted.

The principal objections of the American Bar Association are these:

First in the definitions of section 2, which begin with the statement that, "As used in this act—(a) The term 'antitrust law' includes:"—and the bill then provides in section 2 that it would include the Federal Trade Commission Act.

We would recommend that that phrase or section be deleted for the reasons as Mr. Maletz indicated earlier that it is not an antitrust law, and the Attorney General has no jurisdiction to enforce it. Therefore, there is no occasion to give the Attorney General civil powers to investigate a violation of a statute which he has not authority to enforce.

Similarly, in section 3 of the definitions, we would recommend the deletion of the provision that section 3 of the Robinson-Patman Act is an antitrust statute for the two reasons:

First, the Supreme Court in the *Nashville Milk* case held that it was not an antitrust statute; and, secondly, it is a criminal statute.

And while, as has been indicated here, the Attorney General does have responsibility for enforcing section 3 of the Robinson-Patman Act, since it is a criminal statute, the presently available grand jury process is certainly adequate. No complaint has ever been made that the grand jury process is inadequate to enforce criminal statutes,



and there would never be an occasion for him to bring a civil case under section 3, because there is no civil responsibility.

My own suggestion——

Mr. MALETZ. Excuse me.

Mr. SIMON, could the Attorney General get an injunction to bar a future violation of section 3 of the Robinson-Patman Act?

Mr. SIMON. Yes, he could, of course.

Mr. MALETZ. He could?

Mr. SIMON. Yes.

Mr. MALETZ. Section 3 of the Robinson-Patman Act?

Mr. SIMON. Excuse me. Section 16 of the Clayton Act permits the Attorney General to obtain a temporary injunction to enjoin violations of the antitrust laws. But under section 1 of the Clayton Act, section 3 is not an antitrust law. Therefore, he would not have authority under section 16 of the Clayton Act to get an injunction barring a section 3 Robinson-Patman violation.

Now, there is always the broad equity power of the Attorney General to seek an injunction to enjoin the violation of any criminal statute, but he could not do it under section 16.

Mr. MALETZ. Since the Attorney General could seek an injunction to prohibit future violations of section 3, in what respect, from the standpoint of this legislation, is section 3 different from sections 1 or 2 of the Sherman Act?

Mr. SIMON. There is great difference: Sections 1 and 2 are definitely civil statutes as well as criminal statutes. The Attorney General is expressly by statute given the choice as to whether he will proceed criminally or civilly, and we all know that there are certain cases where, because they involve novel questions of law, do not involve an intent to fix prices, a jury would not convict. Therefore, the Attorney General properly decides that this is not a case for an indictment but for a civil suit. In that case, in the exercise of his public interest discretion he brings a civil suit and he has no authority under existing law to get documents except if you give him this authority in this bill.

Now section 3 of the Robinson-Patman Act by statute is purely a criminal statute. If the Attorney General finds a violation of section 3, he has no alternative, if he is going to prosecute at all, but to prosecute by an indictment. The power to get a civil injunction would only lie in the general equity jurisdiction of the court.

And my strong feeling would be that no court would ever consider a bill for a civil injunction on section 3, unless you first had a conviction, because the criminal remedy would be presumed adequate.

The important point, Mr. Maletz, I think is that if there is a violation of section 3, it can be prosecuted only criminally, and, therefore, the use of the grand jury cannot be a subterfuge in that case.

Mr. MALETZ. There is legislation pending before this subcommittee which would make section 3 of the Robinson-Patman Act part of the antitrust laws.

Mr. SIMON. Right.

Mr. MALETZ. If that bill should be enacted, would your objection to including section 3 of this bill be obviated?

Mr. SIMON. One of the two objections would be. Of course my first objection is that it is not an antitrust law. This would be

obviated if Congress made it an antitrust law. But so long as it remained solely a criminal statute, then the second objection would still be applicable.

Mr. MALETZ. It wouldn't be solely a criminal statute because the Attorney General under section 15 of the Clayton Act could then bring suit to enjoin violations of section 3?

Mr. SIMON. You are correct.

Mr. MALETZ. So your objections would be completely obviated, would they not?

Mr. SIMON. Let's say "largely."

Mr. RODINO. Then, Mr. Simon, I take it that the position of the American Bar Association is such that recognizing the need for this type of legislation and, its broad objectives, your concern primarily is with these safeguards which you have presented in the bill you have included in your statement.

Mr. SIMON. That is correct, Mr. Chairman. That is absolutely correct.

Mr. TOLL. Mr. Chairman, might I inquire to make this clear?

In other words, you want this authority limited to the Sherman Act only?

Mr. SIMON. No, sir. In section 1 of the Clayton Act, Congress has defined what constitutes the antitrust laws, and we suggest that this bill adhere to the definition of what constitutes an antitrust law, which Congress has provided for in section 1.

Now they do include the Sherman Act and Clayton Act, but they include other sections, too, sir.

We have four changes that we propose in section 3(a) of the bill. At least three of these four changes, I believe, are no longer controversial. In line 8 on page 4, after the word "person" we would insert the words "under investigation." This would have the effect of limiting the civil investigative demand to a corporation who was being investigated and would deny its use to a company who was a pure witness.

Mr. MALETZ. Mr. Chairman—

If you provided such a limitation, wouldn't you in effect be leaving unsolved certain of the problems that are presently existent?

Mr. SIMON. Yes, Mr. Maletz. The only—

Mr. MALETZ. Isn't it frequently necessary for the Department of Justice, in conducting an investigation, to get information not only from the corporation being investigated but from many other corporations?

Mr. SIMON. Yes, sir, and the only suggestion I can make to your inquiry is that normally a company who is not being investigated, who is merely a prospective witness, will be cooperative. There would be no reason they shouldn't be.

I agree not always, normally.

Mr. MALETZ. They haven't been invariably cooperative, have they, according to the testimony of Judge Loevinger before the Senate Antitrust Subcommittee and according to the testimony of the Attorney General this morning?

Mr. SIMON. No, sir. Their testimony related solely to people being investigated. They did not talk to the subject of people who were not being investigated but merely witnesses. But I think the answer is, Mr. Maletz, it is purely a question of weighing the equities between

subjecting a company that is a pure witness to this proceeding against the need of the Department to get something from a witness who in an isolated case may be recalcitrant.

Mr. MEADER. Mr. Chairman?

I notice your draft bill omits 4 as well. You want to strike subsection 2 of the definition, subsection 3, but your bill omits subsection 4 as well?

Mr. SIMON. Yes, sir.

May I say, Congressman Meader, I had planned to talk to what I thought were the most important points. This is one of them, and our reason for omitting 4 is simply this: 4 would include within the scope of this statute any bill that Congress at any time in the future passed which related to restraints of trade.

Now, there are a great many bills now on the statute books relating to restraints of trade which you wouldn't even consider putting in this bill.

Let me give you a few examples.

The Commodities Exchange Act relates to grain exchanges and commodity exchanges. This is administered by the Secretary of Agriculture. Nobody has suggested that the Commodities Exchange Act be within the scope of this bill. And yet if Congress, after enacting this bill, were to subsequently enact another bill such as the Commodities Exchange Act giving certain restraint of trade jurisdiction to the Secretary of Agriculture, under the broad language of this bill, it would be included within the Attorney General's power to issue civil investigative demands. And we think since you intend this bill, or since the purport of the bill appears to be to limit it to antitrust statutes within the jurisdiction of the Attorney General that something like section 4 should not go beyond antitrust statutes which the Attorney General has jurisdiction to enforce.

The second change that we would suggest in section 3(a) is in line 9 to substitute for the word "pertinent" the word "relevant." Our reason for this, of course, is that there is a large body of Federal law on what is relevant evidence, and you would then be legislating in the light of known Federal law.

The third change is in the same paragraph in line 10 to insert after the words "he may" and prior to the word "issue" the words "prior to the institution of a civil or criminal proceeding."

This would mean that the civil investigative demand would be available to the Attorney General only prior to the issuance of a suit.

The obvious reason for this is once the complaint is filed, he has the Federal rules of civil procedure which give all the discovery that would be necessary.

Our fourth change in this paragraph is to eliminate the last word in line 12 which is "examination," and to substitute for it "inspection and copy."

Mr. DONOHUE. Inspection and what?

Mr. SIMON. And copying. The effect of this is that instead of a business concern delivering its original records to the Department of Justice, for the Department of Justice to keep they would merely deliver them to the Department of Justice to inspect and to photostat.

We have four reasons for urging this change, which I urge upon you as one of the two most important changes I have to talk to today.

First it would be difficult for any businessman to carry on his business without his original books and records, and having in mind that under this bill they may be retained for a year, a year-and-a-half or even longer, it would be virtually impossible for the company to carry on its business.

Secondly, as a practical matter, the businessman would have no alternative, if he were required to turn over his books and records, but to photostat them before turning them over because he would have to know what was in his records. This would mean, if the civil investigative demand were very broad, photostating virtually everything in his office, and this might be a photostating bill of several thousand dollars.

On the other hand, if the originals are merely submitted to the Attorney General for his inspection, he can pick out which ones he wants, and then photostat only the relatively few documents that he decides that he wants.

Third, the Federal Rules of Civil Procedure provide for inspection and copying just as we propose here, and I see no reason for giving the Attorney General a broader power before complaint than after complaint.

And, fourth, to give the original documents to the Attorney General would create the odd result of immunizing them from being offered in evidence in a treble damage suit, even a double damage suit against the very company that is being investigated. Because since the documents were in the possession of the Attorney General, and by statute he is prohibited from doing anything with them except offering them in evidence in a lawsuit or making them available to a congressional committee, he could not respond to a subpoena, and they would not be available in a civil suit.

I would like to talk for just a moment to the suggestion that Mr. Maletz made this morning and the testimony of the Attorney General on the subject.

The Attorney General said that it would be the routine case to take just copies, and that only in the extraordinary or isolated case would they want the original.

We aren't talking about giving a typewritten copy or a longhand copy. We are talking about photographic copies. And there are in existence reproducing machines that will reproduce everything on the document. We know that in antitrust frequently a longhand notation on the margin is important, and some of the older machines won't reproduce that, but this can all be reproduced today, and the Attorney General can get a document which is a complete copy.

Now, if when the case comes to trial he needs the original as Mr. Maletz suggested, he can always subpoena it, and if the company then comes in and says, "Well, we have lost it or destroyed it" the photostat, then becomes the best evidence, and would be admissible at the trial.

There has been a suggestion made, which I think is unnecessary, but which would certainly meet all of the requirements of the Attorney General, and that is to provide in the bill that he merely have the right for inspection and copying, but if in a particular case he felt he needed the original document, he could then apply to the district court for an order to give him the particular original document.

I would like to suggest, as I am sure all of you know, that Congress can't legislate with respect to the particular occupant of the Office of Attorney General or Assistant Attorney General. And while Mr. Kennedy says that only rarely would he ask for the original document, and he would not inconvenience people, Congress passes a law forever, and if the statute on its face said that the Attorney General had the right to the original documents, there is certainly no reason why a future Attorney General would not read the statute and conclude that it meant what is said, and insist on the original documents, which would not be of any benefit to him, and would be of a great hardship to the persons served with the subpoena.

Mr. CRABTREE. May I ask a question at this point, Mr. Chairman?

As a practical matter, in the cases when companies under investigation today cooperate with the Department of Justice, do they not usually furnish copies instead of the originals?

Mr. SIMON. It is done in two ways, and I do not know which way is done more frequently.

My guess is they are equally frequent. One way is to permit the FBI agent to come into the company's office and go through the files and the Department picks out what they want, and after they have picked out what they want, they then either themselves or the company photostats what they have asked for.

The other means is to deliver to the Department of Justice, usually in Washington or in the field office, photostatic copies of a group of documents that they have asked for. Generally, where it is a large area of documents, the first method would be pursued.

Where it is a smaller area, the second method would be pursued. But I know of no case where the Department has insisted on original documents from anybody who was cooperating with them in this area.

Mr. MEADER. Mr. Chairman?

Mr. DONOHUE. Mr. Meader?

Mr. MEADER. I would like to ask Mr. Simon if he is familiar with any precedent for this phraseology: "make available such documentary material for inspection and copying."

We are familiar with the concept of the subpoena, and, as a practical matter, the congressional committees or departments of the Government and independent agencies, after serving a subpoena, work it out by inspecting the documents and making copies in the office of the corporation under investigation.

But it strikes me that if you depart from the subpoena concept, you may be raising some novel constitutional problems.

Mr. SIMON. May I make two comments on that, Congressman?

First, the phrase, "inspection and copying," is in the Federal Trade Commission Act.

Mr. MEADER. Yes.

Mr. SIMON. Section 9.

Mr. MEADER. I noticed that.

Mr. SIMON. Secondly, it is in the Federal Rules of Civil Procedure, both of which provide for a person producing documents which the Government may inspect and copy.

And may I say, secondly, this is not an American Bar proposal, but one of my own that I think has great merit. If I were enacting legislation such as you have here, I would provide for a civil subpoena, a subpoena which the Attorney General would get from the U.S. district

court in the same manner that he gets a grand jury subpoena, and I would have the statute provide that any document of the type which would be subject to a grand jury subpoena may be subject to a civil subpoena, and that the civil subpoena would be returnable before any person named by the court in issuing the subpoena, with the Attorney General given the right to nominate a person.

I assume in 9 cases out of 10 the court would accept the Attorney General's nomination.

But, to me, the great virtue of this statute is, you could get it all in one paragraph. You would not need a 10-page bill because you would be leaning on the body of Federal law applying to grand jury subpoenas, and you would be saying that where the Attorney General can get a grand jury subpoena for certain documents, if it is of a civil nature he can get exactly the same subpoena returnable before somebody nominated by the court, and the court, of course, would have full control and power to enforce the applicable rules relating to subpoenas.

Mr. MEADER. I am glad for that statement, Mr. Simon, and I might say that I share your approach, using existing bodies of law rather than engaging in some completely novel procedure which may raise a lot of problems.

But I want to get back to my question about inspection and copying.

I agree that the Federal Trade Commission Act does say in section 9 that the Commission "shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any documentary evidence of any corporation being investigated."

And I assume that that language could be lifted and put right in this proposed bill.

But suppose the corporation being investigated refuses that access?

Then the only real remedy is a subpoena. But your bill would provide for inspection and copying, but in the event there was a refusal, you do not have any subpoena power?

Mr. SIMON. No, sir.

What we would do, and what this bill would do, if you adopted our amendment is, the Attorney General could issue a civil demand on a corporation saying: "I want a large body of documents."

If the corporation felt that this was an unreasonable demand, they would be privileged to go into the local Federal district court and ask the court to measure the requirements against the needs, and if the court substantiated the Attorney General's demand and held it was appropriate, or cut it back from its original scope to where it was, in fact, appropriate, then the corporation would be required to produce the documents to the Attorney General or his agent for the inspection and copying, and by "copying" I mean photostating.

So that the man would come under penalty only if he ignored the court order requiring him to produce the documents.

Mr. MEADER. Incidentally, in connection with your statement that you would give the Attorney General the same power in civil actions that he has now with respect to criminal actions, I would like to have some language for our record of what you think might be done in that line, but to get back to this question of inspection and copying, it seems to me that involves presence on the premises of the person or corporation of a Government investigator.

Mr. SIMON. Yes, sir.

Mr. MEADER. And that it might involve search and seizure and invasion of private rights to make that kind of remedy an enforceable remedy.

We had this same problem with the Port of New York Authority. We had our investigators up there in their offices, and they would show us everything they published and all of their self-serving statements, but when we wanted to look at their books, they said no.

Well, there was no way of sending a U.S. marshal in there and forcing access to their books and records. We had to subpoena their records down here to Washington, and they brought some and refused to bring others.

Now, the subpoena concept is well established in the law. But this invasion of privacy and access to premises and to property of private individuals such as is contemplated in section 3(a) of your draft, it seems to me, raises some questions. Even though you may say we have the right to do it, as we do in the Federal Trade Commission Act, the only remedy is the subpoena.

Mr. SIMON. I can recognize what you say, Congressman Meader, but I also recognize that in most antitrust cases there is bound to be relevant evidence which the Government can get only from the companies being investigated.

Currently, the Attorney General can get this only by calling a grand jury. As one who is mostly on the defendant's side, I do not want to force him to call a grand jury. If he is entitled to documents, and if he ought to get them, I would be just as happy to have him get them without calling a grand jury, because if he calls a grand jury, he would be prone to use it, and I do not want to encourage him to use a grand jury.

But the present bill says the businessman has to turn over the documents to the Attorney General, and we think it is a substantial improvement on the problem of actually turning them over and surrendering your original documents to say: "We will let the Attorney General look at them, and if he finds anything there that he needs, let him photostat them." This is much less an invasion of private rights than the present bill.

Mr. MEADER. You do not have any doubt about its constitutionality and enforceability?

Mr. SIMON. No, sir.

It is in line with so many other acts of Congress requiring corporations to produce documents for inspection and copying that I think it clearly within the constitutional power of Congress.

Mr. MEADER. Just how would you enforce it in any other way except by the use of the subpoena power? Would you get a court order instructing the Port of New York Authority—let us use that example, rather than some corporation—to permit Mr. Maletz and Mr. Singman to go in and look at their books and take copies of them?

Mr. SIMON. I would like to avoid the question of the sovereignty of the States and State authority. But if you are limiting it to corporations—

Mr. MEADER. Let us take United States Steel, then.

Mr. SIMON. Any corporation under this bill, as we would amend it, if they were served with a civil investigative demand, they could write the Attorney General and say:



"We have your civil investigative demand and we respectfully decline to comply."

The Attorney General would then have to go into the U.S. district court in the district where the company maintained its office or had the books and ask for an order of enforcement. Under our bill, when the Attorney General asked for an order of enforcement, the businessman could reply by saying:

"This is too broad a subpoena," and ask that it be cut back to reasonable width.

But after the court ruled and decided that the demand was valid, or reconstituted it to make it valid, then the man would have to comply with it. There would be no question.

Mr. MEADER. And the court could then order that a U.S. marshal or the Army, if necessary, move in and take possession of the premises and the articles subject to the investigation demand?

Mr. SIMON. Well, sir, I am sure he would never have to go that far because the court would have the power to send to jail for contempt whoever refused to supply them, and I am sure that this would make unnecessary sending the Army.

Mr. DONOHUE. In line with Mr. Meader's suggestion, will you submit language that might be incorporated into this particular bill to carry out your thoughts?

Mr. SIMON. Yes, sir.

We have submitted here language for amending this bill.

Mr. DONOHUE. I mean in that section of the bill at the conclusion of paragraph 3(a).

Mr. SIMON. We would substitute, Mr. Chairman, for the word "examination," the words "inspection and copying".

Mr. DONOHUE. But granting the power to the Attorney General that same right of subpoena in civil cases that he now has in criminal cases?

Mr. SIMON. I would be happy to do that, Mr. Chairman, but may I suggest that would be a substitute for the entire bill. You would not need this if you had that.

Mr. MEADER. May I ask this.

May I ask where this provision for making available documentary material for inspection and copying is enforced?

Mr. SIMON. Yes, sir.

In section 5(a), (b), (c), and (d).

Mr. DONOHUE. Section (e), you say?

Mr. SIMON. 5(a), (b), (c), and (d), of the American Bar bill provides for the enforcement procedures.

Mr. MALETZ. Mr. Chairman, may I ask Mr. Simon this question?

As I understand it, you personally would prefer a bill which would give the Attorney General the authority to seek from the court the issuance of a precomplaint subpoena, is that correct?

Mr. SIMON. Yes, sir.

Mr. MALETZ. Now, would you also suggest that the Attorney General have corresponding authority to take a precomplaint deposition?

Mr. SIMON. I would see no objection to that, Mr. Maletz, conditioned on his filing a petition with the court giving some cause for doing it.

The premise on which I would proceed is that if he can do it by grand jury, there is no reason for compelling him to use a grand jury,



and he should be permitted to do substantially the same thing without invoking the grand jury process.

Mr. MEADER. But still by resorting to a court?

Mr. SIMON. Yes, sir.

Mr. MEADER. Rather than doing it all within his Department?

Mr. SIMON. I feel that the Attorney General is a prosecutor. This is not a reflection on the Attorney General. This is the job that the Congress created for the Attorney General. He is the prosecutor.

And when the prosecutor is investigating crimes, I think it should be under the jurisdiction of the U.S. district court so that there is somebody between the prosecutor and the ultimate petite jury to protect the citizen against any abuses that might exist, without saying there would be, of course.

Mr. DONOHUE. Do I understand that this right to subpoena in civil actions arising out of antitrust activities would apply to third persons other than the person being investigated? What I have in mind, supposing, now, that an antitrust action was contemplated against U.S. Steel.

Would this civil subpoena grant to the Attorney General the right to go to, say, Inland Steel to find out if they were collaborating with U.S. Steel in violating the antitrust laws?

Mr. SIMON. In the case you pose, Mr. Chairman, the Attorney General would, no doubt, be investigating both of them. It is common for the Attorney General to investigate 20 companies and end up indicting only 3 or 4.

This would present no problem. Clearly, that would be a case of both of them being under investigation.

The more difficult problem is, in the case you pose, if he also wanted a document from Joe's Hardware Store, and the question is: Who is he?

He is clearly just a witness who would have nothing to do with the problem. I would say the more difficult question is whether the Attorney General should have the power to issue a subpoena against Joe's Hardware Store.

Mr. Maletz and I talked to that earlier. I think this is a close question of balancing the equities of subjecting the small man, not involved in the investigation, to the hardships of court proceedings, against putting a restraint on the Attorney General in the prosecution.

For myself, I would decide that question in favor of protecting the small man who is not involved. But I concede that it is not free from doubt.

Mr. MEADER. In a grand jury proceeding, he would be able to get information from Joe's Hardware?

Mr. SIMON. Yes, he would.

Mr. DONOHUE. There is no question about that. That is a criminal action.

Mr. SIMON. That is correct.

Mr. DONOHUE. And that is in accordance with the procedural acts of States and the Federal Government?

Mr. SIMON. Yes, sir.

Mr. DONOHUE. But is it not a radical departure from the rules of civil procedure to have a subpoena served on someone before any action is brought?

Mr. SIMON. Yes, sir.

But I would give that to the Attorney General as to people he is investigating.

Mr. DONOHUE. Oh, I have no question in my mind about subpoenaing the records of the individual that is being investigated. But take the case that you have cited. What about Joe's Hardware Store?

Mr. SIMON. I would decide the question in favor of protecting him, having in mind that if the Attorney General had a case and brought a complaint, after complaint he could always bring Joe's Hardware in.

Mr. DONOHUE. That is right. There is not any ifs, ands, or buts about that.

Mr. SIMON. Right.

Mr. DONOHUE. But before the bill of complaint is drawn and filed, should everybody be subjected to having their records brought into the field office or the central office of the Attorney General?

Mr. SIMON. As I say, Mr. Chairman—

Mr. DONOHUE. Because they suspect or are on a fishing expedition? I think that would clearly violate the Constitution insofar as search and seizure is concerned.

Mr. MALETZ. Mr. Chairman?

Mr. SIMON, does not the Federal Trade Commission now have the power to obtain, prior to its filing of a complaint, documents from prospective witnesses from Joe's Hardware Store.

Mr. SIMON. Yes, sir.

There is no distinction made in section 9 of the Federal Trade Commission Act as to a prospective—

Mr. MALETZ. As between a prospective witness and a company under investigation?

Mr. SIMON. That is true.

Mr. MALETZ. And this bill presently would make no distinction between a prospective witness and a company under investigation?

Mr. SIMON. That is correct.

Mr. MALETZ. And you propose, because of the considerations you have outlined, to make such a distinction?

Mr. SIMON. Yes, sir; by putting my suggestions in different categories.

Mr. MALETZ. Yes.

Mr. SIMON. There are some that I am urging more strongly.

Mr. MALETZ. I understand.

Mr. DONOHUE. Proceed.

Mr. SIMON. As to the next change we would make in section 3(b)(2), in line 17, we would delete the words "class or classes of," and this would merely make a change that would require the civil investigative demand to describe the documentary material to be produced rather than the class.

Let me give you an example.

Under the bill as it is now drawn, it would be possible for the Attorney General to say:

"Bring in all the correspondence of the president of the company."

This would certainly be a class of material. We think it should be more limited. Now, I do not suggest for a moment that it be so narrow as to say, "a letter from A to B on July 16, 1954."

But I do think it would be adequate for the Attorney General's purposes if his correspondence were narrowly described, such as: "All correspondence between Mr. Jones and any competitor on the subject of prices," let us say. This would more narrowly limit the scope and not require the extensive production of documents that had nothing to do with the investigation.

Mr. SINGMAN. Mr. Chairman?

Mr. Simon, would not that precaution already be written into the bill by the requirement that the material sought be relevant, and that the material sought be no broader than that that could be sought by a subpoena, a grand jury subpoena?

Mr. SIMON. I think you may well be right.

On the Senate side Judge Loevinger and I agreed on what type of material should be called for, and our only difference was whether these words did or did not mean what we both agreed ought to be the end result.

Next, we would delete paragraph 4 at the top of page 5, which requires the identification of the custodian, and, similarly, would delete all provisions of the bill relating to the custodian because we think a custodian is unnecessary if you provide merely for the inspection and copying.

I assume the basic purpose of the custodian here is he is going to have possession of the original documents. If you grant our change for the inspection and copying, it seems to us that the need for the custodian no longer exists.

In paragraph (c) (1) on page 5, in line 7, after the word "unreasonable," we would add the words "or improper."

This would require that the subpoena—that the demand be cut back, if it was unreasonable or improper. And I think in the case law on subpoena duces tecum there is a distinction between an unreasonable demand and an improper one. It can be reasonable and still improper, and while this is not important, we would add the additional word.

Mr. DONOHUE. That is on line 7?

Mr. SIMON. Yes, Mr. Chairman.

Mr. MALETZ. I do not quite understand the reason for the inclusion of that term, "or improper," Mr. Simon.

Mr. SIMON. The question of reasonableness is basically one of the burden, relevancy, that sort of thing. The question of propriety may include, say, privileged documents. A document may be relevant and not very difficult to find, is easily obtained, and, therefore, the demand is reasonable. But the demand may be improper if the document is an attorney's work product or an otherwise confidential paper.

Mr. MALETZ. Is not the entire question of privilege covered by subsection 2, just below that?

Mr. SIMON. I think it may well be, Mr. Maletz, and again Judge Loevinger and I did not disagree on what was intended, and I do not think adding "improper" changes what Judge Loevinger said was intended as the scope of this bill.

Mr. MALETZ. In other words, all privileges would be available under the language of subsection 2, beginning on line 11, page 5?

Mr. SIMON. I would hope so.

Mr. MALETZ. So I take it that your suggestion for including the term "or improper" is motivated by an abundance of caution?

Mr. SIMON. That is correct, sir.

Mr. DONOHUE. Mr. Meader has a question that he would like to ask.

Mr. MEADER. Mr. Simon, if I may, I am going to have to leave because of another commitment, but I would like, before I leave, to have your comment on the criminal penalty provided on page 12 of the bill which was the subject of some colloquy between myself and the Attorney General.

Were you present?

Mr. SIMON. Yes, sir; I was.

And I would say this, Congressman Meader:

We recommended deleting the criminal penalty in its entirety, and we would do this for three reasons.

There is presently on the statute books a criminal penalty for anyone obstructing justice. I think that, for example, burning a document that one was ordered by a court to produce would, no doubt, be found to be obstructing justice.

Secondly, section 1001 of the criminal code, which the Attorney General referred to this morning, makes it a crime for anyone to make a false statement to a Government agency. Thus, if one were asked, "Are these all the documents?" and he falsely answered that question, he would be violating section 1001 of the present criminal code.

And, thirdly, even as now drafted, this bill provides that if the demand is refused, the Attorney General go into the district court and get an order of enforcement by the district court.

And once the district court has ordered enforcement of the subpoena, he has the full power of contempt to send the man to jail and not merely for 30 days, but until he produces the documents.

Therefore, we think those three very severe criminal penalties will guarantee the Attorney General compliance with whatever is in this law, without adding the additional criminal penalty. And I give you an example which I am reasonably sure you had in mind, Congressman Meader, this morning.

All of us who have had the responsibility of going through a subpoena have had to decide whether it is intended to include certain documents or not. Frequently, it takes lawyers a considerable amount of time to decide, "Well, do they want these documents or didn't they intend to include them?"

And you emphasize the word "withhold" here. If one made an honest mistake of judgment, as to whether a document was called for by demand, and it turned out later that somebody thought it was called for, and he had honestly thought it was not called for, he may well be withholding.

Now, I appreciate that you would still have to have an intent, but this might create a jury issue, and I do not think you need these criminal penalties in view of what you already have.

Mr. MEADER. Let me ask you if this provision would not go far beyond any existing law in providing an automatic remedy for a departmental demand by making it a crime to refuse to honor the demand?

Would it not go beyond the power of subpoena of the Congress of the United States, for example? If we should make it a crime for the Port of New York Authority, without any contempt proceedings or calling the attention of the House or using the code, simply to make it a crime per se to withhold information from a congressional committee, would that not be outrageous?

Mr. SIMON. Well, sir; it is inconsistent with section 5(a), because, as I read section 6(a) of the bill, if a demand is served upon a person, and let us say there is no question that he has the document the demand calls for and everybody knows what the document is, and he just willfully refuses to produce it, perhaps on the advice of counsel that it is not relevant to the case, but, at any rate, he willfully refuses to produce this document. I think that section 5(a) of this bill contemplates that in that case the Attorney General will go before a district court and ask the district court to order the man to produce he document.

But if section 6(a) is in there, the Attorney General may never go before the court and ask for an order requiring its production. He may just go before a grand jury and get an indictment for the willful refusal to produce the document. And I think what you are trying to do here is, not send people to jail for refusing in good faith to produce a document, but, rather, you are trying to permit the Attorney General to get the documents.

And the way he gets the documents is not by sending the man to jail, but by getting a district court to order him to produce the documents.

Mr. MALETZ. Mr. Simon, as I understand it, it is your position that section 1001, title 18, would be applicable?

Mr. SIMON. It is applicable, Mr. Maletz, to the case where someone says, "These are all the documents we have," and makes a false statement with respect to what he is turning over.

Mr. MALETZ. I see.

And, therefore, it is your position that section 6(a) is unnecessary, is that correct?

Mr. SIMON. Having in mind the three things; not only 1001, but the obstructing justice statute, and also the fact that under 5(a), if he refuses to comply, the Attorney General expressly says in 5(a): "We will go to the district court and get an order for compliance."

Then, of course, he would be in contempt of the court if he did not comply.

Mr. MALETZ. Now, this is Judge Loevinger's response to the position that you have taken, and I quote from his testimony at page 44 of the hearings before the Senate Antitrust Subcommittee:

Senator KEFAUVER. Your point is, and I agree with you, that it is better to have a penal section in this particular act rather than having to try to rely upon the overall section, section 1001, is that correct?

Mr. LOEVINGER. Yes, section 1001 is essentially part of the False Claims and Statements Act and it would require a good deal of litigation to establish whether or not it does, in fact, apply to this bill if enacted.

As I say, I notice in Mr. Decker's statement he says that he believes section 1001 would apply to any willful obstruction with a civil demand.

If that is true, section 6 of the act has the effect of applying a lesser penalty because section 1001 involves a \$10,000 fine and section 6 provides for a \$5,000 fine.

Furthermore, section 6 has the virtue of giving clear, explicit, unequivocal, unmistakable notice to respondents that there is a criminal penalty. There is a criminal penalty attached to any attempt to frustrate a civil demand.

Now we think this justifies the enactment.

Mr. SIMON. Yes, sir.

My basis for disagreement, Mr. Maletz, is simply that where a civil demand is made for a particular document, and the person on whom the demand is served in good faith believes the Attorney General is not entitled to that document, and he would write him back a letter saying, "I have got the document in my possession; I refuse to give it to you and I urge you, under section 5(a) of this very bill, you go to a district court and seek an order of enforcement so that I can be heard in the district court on it."

If 6(a) is in there, the Attorney General might never apply for an order of enforcement under 5(a), and just proceed to indict.

And I do not think that is what Congress intended here.

Mr. MALETZ. Of course, you have the word "willfully" in there?

Mr. SIMON. This would be willful if he says, "I have got the document and I refuse to produce it."

Mr. SINGMAN. Mr. Chairman?

Mr. Simon, are not your comments equally applicable to the subpoenas of the Federal Trade Commission?

Mr. SIMON. In part, yes, although I must say that in the 40-some years that that section of the statute has been on the books, the Commission has never brought a single proceeding under the statute.

Mr. SINGMAN. That is correct.

And is it not true that section 10 of the Federal Trade Commission Act also makes it unlawful to willfully refuse to submit to the Commission any documents requested?

Mr. SIMON. That is the one I assumed you had in mind a moment ago.

Mr. SINGMAN. That is right.

Mr. SIMON. But there has never been a case under section 10, since it was enacted in 1914.

Mr. SINGMAN. Is there any reason to assume that the Attorney General might do otherwise?

Mr. SIMON. I can only say to you that I think Congress should not enact legislation based on what we think an Attorney General will do, but on what the law is going to require him to do.

Mr. SINGMAN. But at least the suggestion that was made earlier that the proposal of 6(a) in this bill is unprecedented or beyond any existing statute is not correct, is that not right?

Mr. SIMON. It is incorrect so far as statutes generally are concerned. It is correct so far as the authority of anybody acting in the executive branch is concerned.

Mr. TOLL. Let me ask you a question there.

If an officer does not take advantage of the provisions of a section of the law over a period of many years, does that indicate abandonment of it?

Mr. SIMON. No, sir.

The Supreme Court has held in many cases that the action or inaction of an officer charged with responsibility for enforcing a statute may be a strong aid to the court in construing what the statute means, but that his inaction does not repeal the clear language of the statute.

Mr. TOLL. Our committee investigated enforcement of the Shipping Act of 1916 and went to work on it with some effectiveness recently.

Mr. SIMON. I think it is quite clear that inaction does not repeal an act that is perfectly clear on its face.

Mr. TOLL. I only asked that question because you said nobody has taken any action.

Mr. SIMON. That is correct.

Mr. DONOHUE. As an illustration, the blue laws up in Massachusetts have not been enforced.

Mr. SIMON. Going to sections 5 and 6 of the bill, there are six changes that we would enact that we think are of considerable importance.

Section 5(a) provides that when a person refuses to comply with a subpoena, or a civil investigative demand, excuse me, the Attorney General may go into the district court in the district where that person resides, and ask the court for an order of enforcement.

But section 5(b) provides that if the man served with the subpoena, with the civil investigative demand, wants to question its validity, then he must, either within 20 days of the service of the demand or prior to the return day, whichever is shorter, appear in the district court of the district where the custodian resides to attack the subpoena.

Now, the effect of this is that if the Attorney General issues a civil demand returnable, let us say, in 10 days from today on a businessman in Boston or in Portland, Oreg., or in San Francisco, Calif., which requires documents to be delivered to a custodian located in the Department of Justice building in Washington, for that businessman to attack the scope of the civil investigative demand, to contend that it is too broad, that it asks for documents the Attorney General is not entitled to, that it otherwise violates his constitutional rights, he must, within 10 days, come to Washington and file his complaint in the district court in Washington. If he lets that 10-day period go by, and does not comply with the demand, then after the 10-day period, the Attorney General may go into the district court in his home district for enforcement. But that district court then has no authority, no jurisdiction, to decide whether the demand was proper or not.

The district court can merely enforce it.

Mr. DONOHUE. What is your suggestion?

Mr. SIMON. Our suggestion, sir, is to in effect combine the two paragraphs and to permit the man who is served with the subpoena to attack it in the district court where he lives, and to attack it at any time up until and including the time the Attorney General seeks enforcement. Thus if the Attorney General brought his complaint in the district court in Boston to seek enforcement, we would permit the man served with the demand to come in and say, "I object to enforcement because it is too broad."

And ask the court to consider the propriety of the demand before ordering enforcement.

Mr. SINGMAN. Mr. Simon, if section 5(b) is simply deleted from the bill, why doesn't what you suggest naturally follow?

Mr. SIMON. Certainly what I suggest would follow if you deleted 5(b) and then tacked on to the end of 5(a) a provision that said, "and in such proceeding the court may consider any attack on the validity."

Mr. SINGMAN. Isn't that already in 5(d)? 5(d) says—

Whenever any petition is filed—

in any district court of the United States under this section, which, of course would include the Attorney General's petition—

such courts shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of the Act.

Mr. SIMON. What I am saying could also be accomplished by adding in there, "and to construe the propriety of the demand." We would also add in that very paragraph, 5(d), a provision that the requirement for producing the documents be stayed pending the final decision of the court.

There is no such provision in the pending bill, and obviously if I have to produce the documents before the court decides my case, I have no redress to the courts, because my case is then moot.

And so we would provide until the court rules you don't have to produce the documents.

Mr. SINGMAN. But I take it, then, you would be quite content if 5(b) were stricken, provided that something were added either to 5(a) or to 5(d) that would make explicit the power of the court to determine the propriety of the demand.

Mr. SIMON. That would completely cover the point we were just discussing.

Mr. SINGMAN. Exactly.

Mr. DONOHUE. Would any action be stayed until the court—

Mr. SIMON. This is the second point which we think is very important because otherwise you really don't have any redress to the courts.

Mr. DONOHUE. Mr. Crabtree had to leave to go to another hearing, but asked that I ask you another question about 5(b), assuming that it were left in. It is provided toward the end of 5(b) in line 16 that the petition shall specify the ground upon which "any constitutional right or privilege of such person" is affected by the demand. Why should the question be limited to constitutional rights or privileges? Should it not be broadened to include any right or privilege, or at least any legal right or privilege?

Mr. SIMON. I would certainly say so, yes. Of course, I would argue that this sentence does not limit the relief the court can grant, but merely singles out one type of objection which was to be more specifically stated than other types of objections.

Mr. SINGMAN. Mr. Simon, have you considered the possible constitutional objections to permitting a respondent to seek an advisory opinion under section 5(b) by the district court as to the validity of a demand whose enforcement is not yet being sought by the Department?

Mr. SIMON. I don't know how he could frame his complaint if he didn't know what the Department wanted from him.

Mr. SINGMAN. The point is under 5(b) procedure as appears now in the bill, the respondent comes into court before the Attorney General has made any move to enforce the demand.

Mr. SIMON. I see.

Mr. SINGMAN. And seeks, in effect, an advisory opinion by the court as to the propriety, legality, relevance of the demand.

Mr. SIMON. But this is after demand has been served.



Mr. SINGMAN. After the demand has been served, but before any attempt has been made to enforce it, and the question I am raising is: Is there any question of constitutional propriety involved in asking a court to rule upon this question before any attempt is being made to enforce the demand?

Mr. SIMON. I would say absolutely not, and I don't believe it is even an advisory opinion, because if the demand has been served this is not substantially different than a subpoena being served. And certainly a man served with a subpoena has a right to come in and move to quash.

Mr. SINGMAN. A court subpoena, but are you familiar with a case involving the Securities and Exchange Commission, *Guaranty Underwriters v. Johnson* (133 F. Sd (f)) where an attempt was made to quash an SEC subpoena before the Commission sought to enforce the subpoena in court. The court said among other things, that there was doubt as to the justiciability of this issue, since an agency subpoena as distinguished from a court subpoena has no effect in and of itself until a court issues an order thereon?

Mr. SIMON. Yes, sir. I am not familiar with the case, but I think I am familiar with the principle, which is that the agency subpoena has no validity until the agency goes to court to enforce it, and there is no penalty for disobeying it.

But I think you have an analogy in the NAM case, where the Attorney General wrote NAM and suggested they better register under the Lobbying Act or they would be in violation of the statute, and NAM filed a petition in the district court here for a declaratory judgment as to whether they were required to register, and the Attorney General moved to dismiss on the ground he hadn't done anything to enforce the statute, but the Court of Appeals for the District of Columbia held that his letter telling them that they had better register constituted a judiciable issue on which declaratory judgments could issue.

Then you will recall that by the time it got to the Supreme Court we had a new Attorney General and he came in and said, "I haven't written any letters" and so the Court said the case was moot and dismissed it.

Mr. SINGMAN. But might not the difference be there that a criminal statute was outstanding, which the respondent might actually be in violation of at that moment, whereas when served with a civil demand by the Attorney General, a person is in violation of nothing until the court order is outstanding against him?

Mr. SIMON. Of course, I think the short answer to what you have suggested, if you make our amendment—

Mr. SINGMAN. The one we have been talking about?

Mr. SIMON. The one I have been suggesting.

Mr. SINGMAN. That is right.

Mr. SIMON. Then there would be no need for the man to go to court in advance, because once the Attorney General files his petition he would file a cross complaint.

Mr. SINGMAN. That is correct.

Mr. SIMON. If you don't take our amendment and you leave in 6(a), he may jolly well have to go to court promptly, because he may be in violation of 6(a), if he lets the 10 days, or whatever the period is in the demand, expire without attacking it.

Mr. SINGMAN. Let me ask you one more question, Mr. Simon. Would your objections to 6(a) be obviated if it were left in but amended simply to delete the word "withholds"?

Mr. SIMON. This would be helpful, but one of the things that always frightens me is when you have three criminal statutes already on the books covering something, and you add a fourth one, and then one has to decide with respect to a given act a wide range of statutes that may be applicable, and I think where you have something already applicable, and if you are going to say it has to be enforced in the district court, where the district court has unlimited contempt powers, I don't see where you have the need for going further.

Mr. DONOHUE. Mr. Witness, the bells have rung, and we must go to the House. So we will declare this hearing adjourned, and any other suggestions that you might have which you have not brought to our attention, if you will submit them to the staff for the record, will be received.

Mr. SIMON. Thank you, sir.

Mr. SINGMAN. Will you submit that draft that was discussed earlier?

Mr. SIMON. Certainly.

Mr. SINGMAN. Of your personal suggestions?

Mr. SIMON. I certainly will.

Mr. SINGMAN. Thank you, sir.

Mr. Chairman, may I offer for the record a statement submitted by the American Mining Congress?

Mr. DONOHUE. Without objection.

(The document referred to is as follows:)

STATEMENT OF JULIAN D. CONOVER, EXECUTIVE VICE PRESIDENT, AMERICAN MINING CONGRESS

The American Mining Congress is opposed to the principle of H.R. 6689, which would compel corporations to turn over documents demanded by the Justice Department in the course of civil antitrust investigations.

An almost identical bill failed of enactment in the last Congress. The present bill is unnecessary, and compliance with its provisions would be unduly burdensome. While the Justice Department takes a reasonable attitude in requesting documents in its civil investigations under the present voluntary cooperation system, there is no assurance that the responsible and cooperative relationship which exists on both sides of most civil antitrust investigations at the present time would continue if the Justice Department were to receive the sweeping powers which would be delegated to it by this bill.

If the committee should decide that authority to demand documents in civil antitrust investigations is necessary—and we believe that it is not—then it is recommended that H.R. 6689 be amended in conformity with the principles of the civil investigative demand bill introduced by Senator Wiley in the last Congress, S. 1003.

If legislation on this subject is considered, the following changes in H.R. 6689 are especially important:

1. Authorize the Justice Department to inspect and make copies of documents relevant to its investigation, instead of permitting the original documents to be seized and carried off by the Government investigators. H.R. 6689 would permit the Justice Department to take original documents and keep them indefinitely. Under such a system a corporation would not have access to its own files.

Requiring the Department of Justice to inspect or copy documents instead of permitting their wholesale seizure would have the wholesome effect of limiting the tendency on the part of the Government investigators to make sweeping, wholesale demands for documents. The knowledge that they would have to either inspect these documents or have the Government go to the expense of

reproducing them would restrain the tendency to clean out a corporation's files on the off chance that something in them might later turn out to be useful.

Furthermore, limiting authority under the bill to the inspection or copying of documents instead of their seizure would render unnecessary the complicated and cumbersome custodian system which H.R. 6689 would create.

Certainly, if corporations are to be required to give up their original documents, a limit should be imposed on the time that the Government investigators would be allowed to keep them—such as the 18-month period contained in S. 1003 and proposed by the American Bar Association and its section of antitrust law.

2. The Justice Department should not be permitted to pass on documents acquired under the civil demand procedure (whether originals or copies) to other Government agencies or to committees of Congress. In cases where other parts of the Government, such as the Federal Trade Commission or the Judiciary Committees of the Senate and the House of Representatives, have a legitimate right to see these documents they have their own procedures for obtaining them.

There can be no justification for shortcutting these procedures by permitting the Justice Department to pass on material it has acquired for its own purposes. To permit such material to be transmitted to another agency or to a congressional committee, whose reasons for examining the documents may be quite different from the reasons which prompted the original demand, would be to make a mockery of the pertinence or relevance test imposed on the Justice Department when the documents are originally required to be produced.

3. Require the return of copies as well as original documents. H.R. 6689 would absolve the custodian of documents from any responsibility for the return of copies made either by the Justice Department, by an other antitrust agency, or by any congressional committee. This would mean that copies of documents which might be highly confidential could be kept long after the completion of the investigation which prompted their acquisition. Furthermore, the custodian would not be responsible for their supervision. Indeed, under the bill none of the restraints designed to restrict to authorized persons the examination of original documents would appear to apply to copies.

4. Limit the scope of the authority to require production of documents to the period of the civil investigation; that is, before legal proceedings, civil or criminal, are actually instituted. No case has been made by the supporters of the bill for need for civil demand procedure once a grand jury investigation of an alleged criminal offense has commenced or once a civil suit has been filed. The law already contains detailed procedures for obtaining relevant documents after legal proceedings have been instituted, and there does not appear to be any reason for an overlap of the civil investigative demand procedures of H.R. 6689 with these established procedures.

(Subsequently, the following were received for the record:)

#### STATEMENT BY THE AMERICAN PAPER & PULP ASSOCIATION

My name is George Boyd, Jr. I am a member of the firm of Dunnington, Bartholow & Miller, at 161 East 42 Street, New York, N.Y., and I am appearing for the American Paper & Pulp Association.

The American Paper & Pulp Association is the overall national association of the paper and pulp industry. The paper and allied products industry operates mills or plants in 47 of our 50 States. The industry includes 479 different companies which produce the primary products of pulp or paper in approximately 850 mills. In addition, there are upward of 4,000 plants making converted paper products. Some 560,000 employees, together with more than 2 million of their dependents, derive their livelihood from the paper and allied products industry. Our annual total industry payroll exceeds \$3 billion.

S. 167 which would authorize the Attorney General to compel the production of documentary evidence required in civil investigations for the enforcement of the antitrust laws is similar to S. 716 and S. 1003 which were considered by the Subcommittee on Antitrust and Monopoly Legislation during the 86th Congress. When hearings were held during the last session of Congress on these last two bills, the American Paper & Pulp Association submitted to the subcommittee and its chairman, Senator Kefauver, under date of March 3, 1959, a letter expressing opposition to these bills.

As we understand S. 167, it provides that whenever the Attorney General or the Assistant Attorney General in charge of the Antitrust Division has "reason to believe that any person may be in possession, custody, or control of

any documentary material pertinent to any antitrust investigation," he may issue a "civil investigative demand" requiring such person to produce such "pertinent" material for examination. The demand would have to state the "nature of the conduct constituting the alleged antitrust violation" and the provision of law applicable hereto, describe the class or classes of material to be produced with such definiteness and certainty as to permit the material to be fairly identified, prescribe a return date, identify the custodian to whom such material would have to be delivered, and specify a place at which such delivery would have to be made.

The authorization thus provided by S. 167 would be in addition to the well-established and far-reaching authority now in effect which permits a grand jury subpoena duces tecum.

We should like to emphasize that the Attorney General is charged by law, and properly so, with the enforcement of the antitrust laws. We are in full accord with their purposes and intent. Let us make it perfectly clear that if there is any valid reason to believe that there is a violation of the Sherman or Clayton Acts, there is a broad recourse through the medium of the grand jury subpoena to require not only the production of pertinent documentary evidence but also testimony by witnesses possessing relevant information.

If the Attorney General is granted authority to compel the production of documentary evidence in a civil proceeding, as he would be under S. 167, the end result in our opinion would be to grant to him a license to indulge in what could only properly be termed as a "fishing expedition." "Fishing expeditions" cannot and would not, in any manner whatsoever, facilitate the enforcement of the antitrust laws and, in most instances, would consume needlessly both the time of the Antitrust Division and of corporate employees, with the inevitable waste of public and private funds and the interruption of the function of business and Government which has been termed to "keep America on the move."

We feel that we should object to any erosions of the American tradition that interference with the private affairs of citizens and private enterprises should be limited to cases of necessity. This bill is based upon the concept that private business is apt to attempt to conceal illegal activities from Government investigators and is unwilling to cooperate with such investigations. We think this is a false assumption. The American Paper & Pulp Association is firmly of the view that the cooperation which companies and industry generally afford the Attorney General in making available voluntarily pertinent documentary material in the course of a bona fide civil investigation provides the Department of Justice with all the information to which it is legitimately entitled. If there are exceptions to this cooperation there is always available to the Government enforcement authorities sweeping subpoena powers that have traditionally been the fully recognized powers of a grand jury.

S. 167 would include within the definition of "antitrust law" section 3 of the Robinson-Patman Act (15 U.S.C. 13a). The U.S. Supreme Court has held in 1958 that section 3 of the Robinson-Patman Act is not one of the "antitrust laws." Although the bill indicates that the inclusion of section 3 in the definition of "antitrust law" is limited to "as used in this act," there is danger that it might erroneously be construed as intending to overrule the Supreme Court decision.

It is our understanding that S. 167's purpose is related solely to civil proceedings. The inclusion in it of the solely criminal provision section 3 of the Robinson-Patman Act is highly irregular. It is well known that there is considerable controversy as to section 3 of the Robinson-Patman Act. Indeed, in the report by the Attorney General's National Committee To Study the Antitrust Laws, dated March 31, 1955, at page 200, it was stated:

"In our view, 18 years of section 3 enforcement have neither furthered the national interest nor realized the congressional purpose. Enforcement organs of the United States have abstained from invoking this provision. Private plaintiffs have emerged as the principal enforcers of its difficult prohibitions, rushing in where the Government perhaps fears to tread. Yet, by challenging apparently normal competitive price reductions as predatory slashes under this nebulous law, indiscriminate private enforcement may well impede the downward price adjustments which mark the effective working of a competitive system."

In the selfsame report, at page 201, the Attorney General's Committee recommended:

"At all events, we recommended repeal of section 3 as dangerous surplusage. Doubts besetting section 3's constitutionality seem well founded; no gloss imparted by history or adjudication has settled the vague contours of this harsh criminal law. It does not serve the public interest of antitrust policy."

We think that it is pertinent to bring to the attention of this able subcommittee the following excerpt from the Wall Street Journal of May 24, 1961, at page 1, which deals with the matter of section 3 of the Robinson-Patman Act:

"For their part, company attorneys seem likely to remind the trust busters that at least one court, the Federal district court in Kansas City, Mo., has questioned the constitutionality of the 'unreasonably low' provision of the law as being too vague. The ruling came recently from Federal Judge Jasper Smith, in dismissing several counts in a Government criminal antitrust case in the milk industry. \* \* \*

The American Paper & Pulp Association strongly recommends that subparagraph (a) (3) of section 2 of S. 167 be deleted (p. 2, lines 7 to 14, inclusive). Any proposal which might conceivably be construed to make section 3 of the Robinson-Patman Act "a part of the antitrust laws" for purposes of private suits should be subject to public hearings called for that specific purpose alone. The inclusion of the criminal provisions of the Robinson-Patman Act in this bill relating to civil proceedings is unwarranted and is completely unrelated to the purpose of the bill.

The provision in S. 167 which would permit the Attorney General to make subpoenaed material or material produced in accordance with what is called "a civil investigative demand" available to congressional committees would establish a unique and dangerous precedent, inasmuch as it departs from the traditional concept of separation of powers and trespasses on the inherent power of the executive to keep appropriate records confidential in the public interest. Subpoenaed documents in the hands of congressional committees could be prejudicial both to the Attorney General and to the person who produced the material. We respectfully point out to this subcommittee that even if no violation should be found as a result of the investigation by the Attorney General, it is conceivable that a congressional committee could use the subpoenaed documents in such a manner as to be more damaging to the person who produced them than would be a proceeding by the Attorney General. We fail to understand why it should become necessary to include such a proposal in S. 167 since congressional committees now possess adequate authority to obtain any documentary material which may be relevant to legislative inquiries.

Accordingly, we recommend strongly that the language in subparagraph (c) of section 4 of this bill be deleted (p. 8, line 3, beginning with the word "provided" to line 6 through the word "Congress," inclusive).

S. 167 provides that the civil investigative demand shall "prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and produced" (lines 21 to 23, inclusive, p. 4). Presumably in an effort to protect from abuse persons upon whom investigative demands are served, S. 167 would authorize such persons to file in the U.S. district court for the judicial district within which the office of the custodian is situated, a petition for an order by the court modifying or setting aside such demand. However, such petition must be filed "within 20 days after service of the demand or at any time before the return date specified in the demand, whichever period is shorter, \* \* \*" (lines 3 to 5, inclusive, at p. 11). This provision would enable the Government, by a simple expedient of specifying an earlier return date or designating a custodian in a judicial district far removed from the person served, to deprive the person of any real opportunity to move against the demand. There can be no urgency which would require that the Attorney General receive material in less than 20 days. This bill would confer additional investigative powers upon the Attorney General that certainly are not needed when litigation is actually underway, and, until this occurs, there certainly can be no urgency.

In addition, S. 167 does not contain any provision for tolling the civil investigative demand during the pendency of a petition to modify or set aside the demand.

Finally, S 167 is deficient in that it fails to specify with any degree of necessary particularity what the investigative demand must contain regarding the alleged antitrust violation which must constitute the basis for its issuance. Therefore, we respectfully request the Antitrust and Monopoly Subcommittee not to report S. 167 or any other "antitrust civil process act."

Respectfully submitted.

AMERICAN PAPER & PULP ASSOCIATION,  
By: GEORGE BOYD, JR.,  
*Counsel, Dunnington, Bartholow & Miller.*

#### STATEMENT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

This statement is filed on behalf of the National Association of Manufacturers, a voluntary membership corporation with about 19,000 members, ranging in size from the smallest to the largest of manufacturing enterprises. The great bulk of our member companies are small businesses, as that term is generally understood.

This association has consistently advocated and strongly endorsed legislation which would aid in an intelligent, fair, and effective administration of the antitrust laws. We are, therefore, interested in the proposals contained in H.R. 6689 because we fear that the defects and the dangers inherent in the proposal outweigh any advantages its enactment might afford the Department of Justice as an aid to the enforcement of the antitrust laws.

Briefly, H.R. 6689 would authorize the Department of Justice to demand the production of certain documentary material which could be used by the Attorney General and other governmental agencies in connection with the investigation of suspected civil violations of antitrust laws, and in proceedings arising from such investigations. Additionally, the Attorney General could turn over such documents to the Judiciary Committee of either House of Congress, presumably for whatever use the committee might choose to make of them.

The reasons advanced in support of this legislation are that when the Department of Justice investigates possible violations of the antitrust laws it must either impanel a grand jury, file a civil complaint, and make use of discovery processes under the Federal Rules of Civil Procedure, or rely upon the voluntary cooperation of concerns under investigation. The Department contends, and rightly so, that resort to the grand jury is not appropriate when only a civil action is contemplated. The Department further contends that it should not be forced to file a "skeleton" complaint and hopes that the Federal rules discovery procedure will unearth fact essential to a valid complaint. It is argued that in the absence of a grand jury proceeding or the filing of a skeleton civil complaint, the Justice Department is left in a position of sole dependency upon voluntary cooperation.

Even if we assumed the validity of these arguments, they do not justify the enactment of legislation as drastic as H.R. 6689. But validity of the contention that the Justice Department is severely handicapped by lack of cooperation by companies under investigation, which in the final analysis is the gravamen of the Department's case, cannot be conceded. Undoubtedly, the Department of Justice is sometimes confronted with concerns that refuse to accede to Government requests for the voluntary production of books and records. It was stated, however, by one of the members of the Attorney General's Committee To Study the Antitrust Laws that "not more than 10 percent of those who are asked for data refuse to cooperate."

The reasons behind the refusal of this 10 percent voluntarily to produce company records must be widely varied and surely many of such reasons are valid. It hardly seems necessary, therefore, in view of the other remedies available to the Government, to arm antitrust investigators with the broad powers proposed here, even if the entire 10 percent who do not cooperate do so for no reason at all except recalcitrance.

The Justice Department has also made a point of the fact that the Federal Trade Commission and other agencies charged with enforcement of the antitrust laws already possess subpoena powers at the investigative stage similar to that proposed in H.R. 6689 for the Department of Justice. In this connection, however, the dissimilar functions performed by these two agencies is of importance.

The Federal Trade Commission is a regulatory agency. Its investigative proceedings are administrative and not a part of the judicial process. The

Department of Justice is a law enforcement agency and is not entrusted with any regulatory powers. Thus, to place in the hands of an executive officer of the Government discovery powers more sweeping than those possessed by a grand jury, yet lacking the judicial restraints and the protection of secrecy, is to disregard the basic distinction between the executive power on the one hand and the judicial power on the other.

It may be that the availability of such an instrument would make easier the work of the Department of Justice, but certainly this is not sufficient reason to adopt a device foreign to our legal traditions and violative of our sense of justice. The fact remains that there has been demonstrated no need for granting to the Attorney General the extensive authority proposed here.

H.R. 6689 appears to us to be fundamentally defective in a number of respects. As noted above, the necessity for authority to issue "civil investigative demands" is urged upon this committee as an aid in the investigation of suspected violations of the antitrust laws in connection with which civil proceedings are, from the outset, contemplated. It is acknowledged by the proponents of H.R. 6689 that the Justice Department is now empowered to employ compulsory process to obtain both documentary and testimonial evidence at every stage of criminal and civil antitrust proceedings except for the investigative stage of civil violations, a gap which this bill supposedly was designed to bridge. But this bill is not so limited.

The term "antitrust investigation" is defined as an inquiry for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation. "Antitrust violation" is defined as any act or omission in violation of any antitrust law or any antitrust order. "Antitrust law" is defined to include, in addition to the traditional definition of the term, the Federal Trade Commission Act, section 3 of the Robinson-Patman Act and "any statute hereafter enacted" which makes available to the United States any civil remedy with respect to restraints of trade or unfair trade practices affecting commerce.

It seems apparent, therefore that the "civil investigative demand" embraces much more than its name implies. This new procedure, arising from an objection to the use of the grand jury in civil cases, would provide the means for avoiding the use of the grand jury in the investigative stage of criminal cases. Thus, it could be used to compel production of documentary material "pertinent" to an investigation of any suspected violation of the antitrust laws, including, for example, section 3 of the Robinson-Patman Act, a purely criminal section.

We recognize, of course, that criminal proceedings may well result from an investigation which, from the outset, seeks only evidence on which to base a civil action. But it seems incongruous, indeed, to make use of a "civil" investigative demand to investigate an alleged violation of a statute under which only a criminal action could result, such as section 3 of the Robinson-Patman Act.

This and many other deficiencies and discrepancies in the drafting of the bill points up the fact that it goes far beyond the alleged need cited in support of its enactment.

It should be noted in this regard that the Attorney General's Committee To Study the Antitrust Laws, in recommending a civil investigative demand, clearly contemplated its use only in a "civil antitrust investigation."

Even if H.R. 6689 could be amended to insure that it would not become a substitute for the presently available discovery proceedings under the Federal Rules, or curtail the use of the grand jury in criminal cases, the vague and indefinite requirements of the demand itself would permit excursion into virtually any book, record or paper in the hands of any company in the land. The material required to be produced pursuant to a demand need only, in the opinion of the Attorney General, be "pertinent" to the investigation. The term "pertinent" has no accepted legal meaning under the Federal Rules, whereas the courts have had opportunities to determine, and thus litigants and recipients of a demand could have some idea, what might be "relevant."

The demand would state the "nature of the conduct constituting the alleged antitrust violation." Both the Attorney General's Committee and the American Bar Association recommend that the "subject matter" of the investigation be stated, including the particular offense which the Attorney General has reason to believe has been committed. These standards would seem to be eminently closer to our traditional safeguards and restraints on the subpoena power than the vague standards set out in H.R. 6689.



It would be an unimaginative antitrust investigator who could not describe the "nature of the conduct" constituting an alleged unspecified violation with sufficient breadth to assure the production of a multitude of "pertinent" documents.

In addition to the broad scope of authority which would be granted by this bill, the persons to whom a civil investigative demand could be directed is almost without limit. Demand could be made upon persons neither being investigated nor suspected of an antitrust violation. In fact, the persons receiving the demand might not know whether he or one of his suppliers or customers or a total stranger was the subject of the investigation. There appears no justification whatever for permitting the wholesale demand for documentary material from companies not under investigation through the use of this type of executive subpoena.

The defects discussed above, as serious as they are, are compounded by the provision that the subpoenaed documentary material must be delivered to an "antitrust document custodian" at the place specified in the demand. Any place within the territorial jurisdiction of the United States could be specified so long as the Government tendered the cost of transportation. Thus, distributors in Dallas, San Francisco, and Seattle might be required to deliver subpoenaed material to Washington, D.C. in connection with the investigation of a supplier located in Richmond or Baltimore.

H.R. 6689 apparently contemplates the production of original books and records. As it is worded, there is no indication whether copies, authenticated or otherwise, would be acceptable in lieu of original records. This, coupled with the fact that there is virtually no limit upon the time such material can be retained, imposes a wholly unwarranted hardship on concerns served with a demand.

In this connection, it is noted that the American Bar Association's proposal would require that the subpoenaed documents be made available for inspection and copying at recipient's principal place of business. This is similar to post-complaint discovery procedure under the Federal Rules, and similar also to the access to records provision normally incorporated in antitrust consent decrees for enforcement purposes. It would seem that access to books and records at the place of business of the person under investigation would amply serve the purposes of the Attorney General without the hardship which would inevitably result from a company's being deprived of its original records for long periods of time.

In addition to the possibility of depriving companies of original books and records for long periods of time, the bill would authorize the Justice Department to make such material available to other antitrust agencies, and authorizes such agencies, as well as the Department, to make and retain copies of such material. Such a provision is obviously unnecessary if the bill is intended only to aid the Department of Justice in civil investigations. The Federal Trade Commission and all other agencies charged by law with the administration and enforcement of the antitrust laws already possess plenary investigative powers. Furthermore, the scattering of such material will inevitably result in loose handling, abuse and unauthorized disclosure of the contents. This would be particularly true of copies made of such material. These could, by the terms of the bill, be retained permanently by the Department of Justice and the agencies involved. This would lead to the accumulation of library copies, even in cases where the investigation revealed no antitrust violation.

This provision for making wide distribution of subpoenaed material for examination and copying is in sharp contrast to the secrecy afforded material subpoenaed by a grand jury.

Assuming the Justice Department does, as it contends, need the investigatory power sought in H.R. 6689, documents produced pursuant to a demand, as well as the contents thereof, should not be disclosed to any person other than an authorized employee of the Department. Moreover, within a fixed and reasonable period of time after production of the material (a maximum of 18 months is suggested by the American Bar Association), all subpoenaed material, including all copies not introduced in the record of an antitrust proceeding, should be returned to the person who produced it.



In addition to making subpoenaed material available to other antitrust agencies, H.R. 6689 provides that "nothing herein shall prevent the Attorney General from making available the material so produced for examination by the Committee on the Judiciary of each House of Congress." There appears to be even less justification for making such material available to the Judiciary Committees than there would be for making it available to other agencies.

The committees of Congress already possess broad investigative powers, including the power to compel the production of documentary material, as well as testimonial evidence, which may be relevant to any legislative inquiry.

The material which would be sought by a civil investigative demand under this bill would, presumably, be selected on the basis of its suitability as an aid in the investigation of a suspected violation of the antitrust laws. It is highly unlikely that material selected on such a basis would be suitable for the broader legislative purposes of congressional committees.

Furthermore, while subpoenaed material in the hands of the Justice Department could be used only in connection with the investigation of a suspected violation or in a proceeding arising from the investigation, there appears to be no limitation or restriction upon the use of such material by the committees. It is not clear from the wording of the bill whether the Judiciary Committees would be authorized to copy material made available to them. Certainly there is no specific prohibition against such copying. Assuming the committees could make copies, there is no requirement with reference to the return of such copies upon completion of the Justice Department's investigation.

Congressional use of such material during the pendency of an investigation by the Department of Justice, or during any proceeding resulting from the investigation could be extremely prejudicial to the Attorney General or the person producing the material, or both. Similarly, even if no violation is found, the committees could still use the documents, without limit as to time, in such a manner as to be more damaging to the person who produced them than a proceeding by the Attorney General might be.

There is also the possibility that documents relating to the investigation or enforcement of specific antitrust cases would encourage the Congress to legislate antitrust enforcement on a case-by-case basis rather than investigating and legislating with respect to the broad policy and philosophy of the antitrust laws.

As noted earlier, H.R. 6689 as now written, disregards the fundamental distinction between the executive and the judicial power. If documentary material produced pursuant to an executive subpoena as an aid to law enforcement is made available to the committees of Congress, the question should at least be raised whether the result would not be a complete disregard of the concept of separation of powers.

Considering the sweeping power which would be granted by H.R. 6689, and the absence of the traditional safeguards surrounding the grand jury subpoena power, or the judicial protection afforded in connection with civil discovery under the Federal Rules of Civil Procedure, we believe there is a very real possibility of abuse inherent in this bill. All that is necessary to bring a civil investigative demand into play is an antitrust investigator who can convince the Attorney General or the Assistant Attorney General in charge of the Antitrust Division that there is reason to believe that a company has possession of documents pertinent to an investigation. There is no requirement that anyone even be suspected of violating the law. An investigation may be undertaken merely "for the purpose of ascertaining" whether any person has violated the law. There could hardly be a clearer invitation to investigators to engage in "fishing expeditions." The civil investigative demand could also be turned into a powerful weapon of harassment under the guise of antitrust investigation. This is not to say that the Justice Department should not be free to investigate possible violations of the antitrust laws. It is quite another thing, however, to grant it an "aid to investigation" which goes far beyond its needs, and so susceptible of abuse as this one is.

In our view, there has been an insufficient showing of need for this drastic measure. Apparently bills to authorize the issuance of a "civil investigative demand" are an outgrowth of the recommendations made by the Attorney General's Committee To Study the Antitrust Laws in 1935, and subsequently

endorsed by the American Bar Association. This bill, however, goes far beyond the powers recommended by the Attorney General's Committee. Even if need for some form of aid in civil investigations of the antitrust laws is conceded, we submit that the proposals of the Attorney General's Committee would adequately fill that need and represent the maximum that should be considered.

We, therefore, respectfully urge that H.R. 6689 not be favorably reported by the subcommittee.

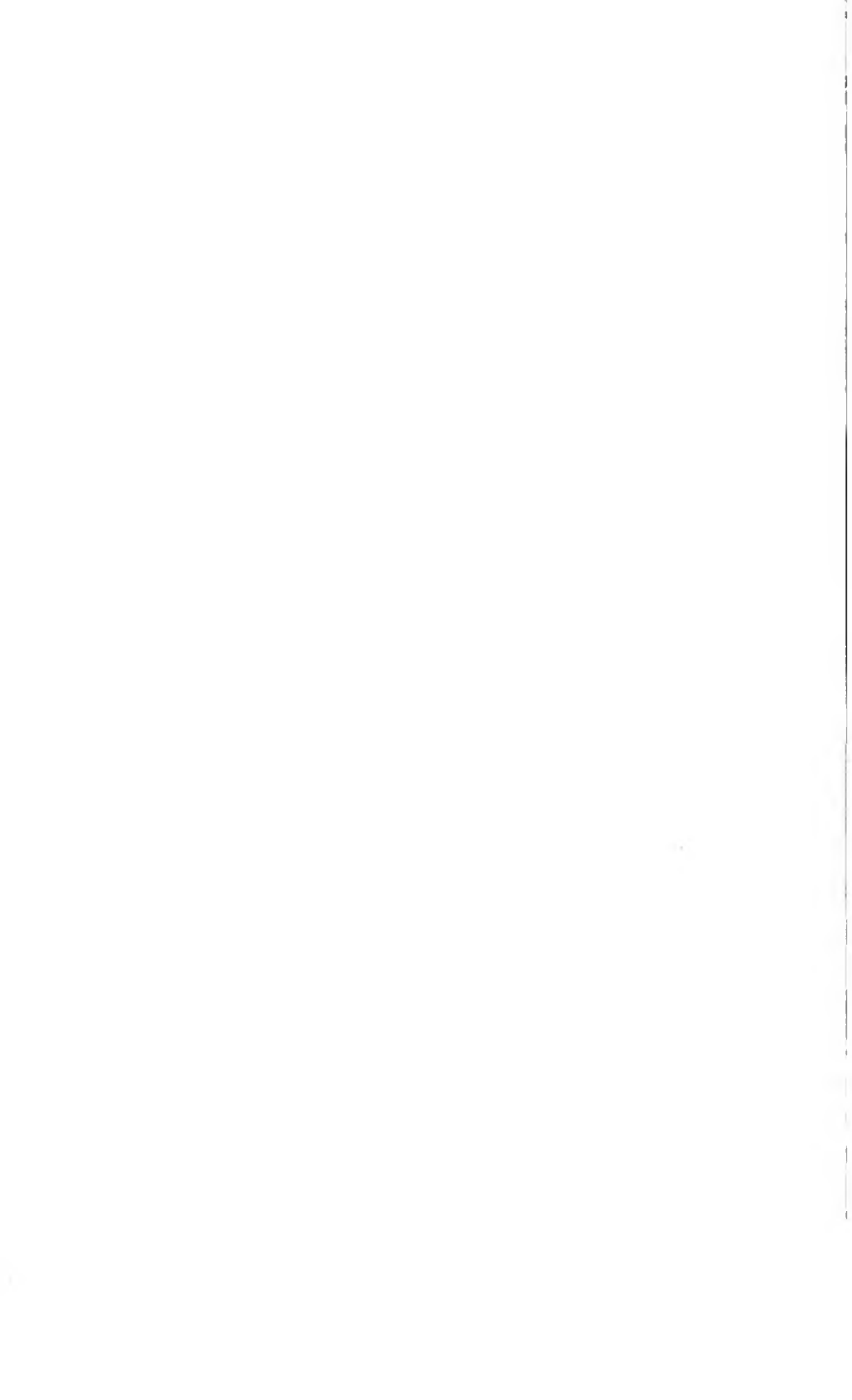
Mr. DONOHUE. The meeting is now adjourned.

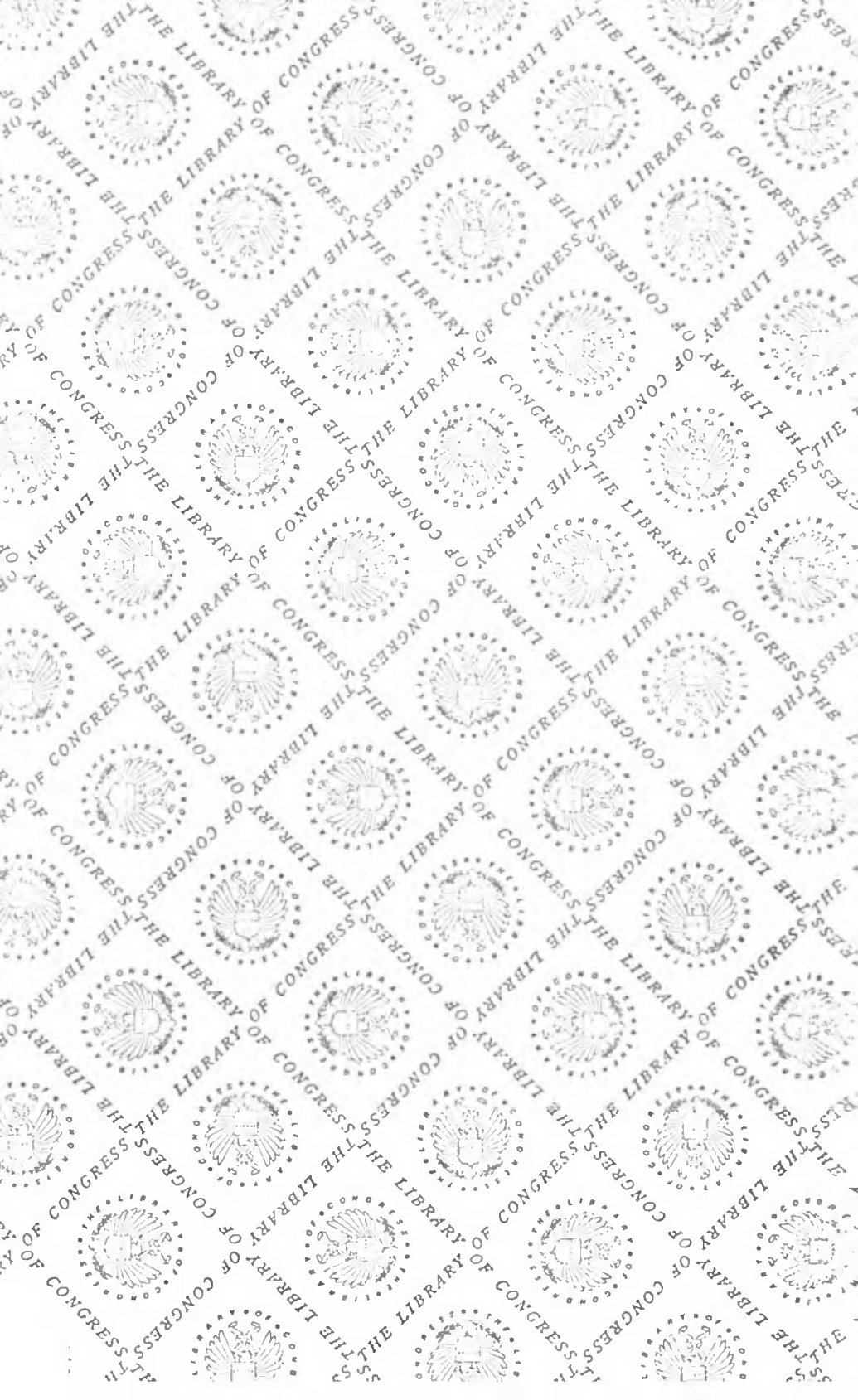
(Whereupon, at 12:30 p.m., the committee recessed, subject to the call of the Chair.)

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